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*The views expressed herein are those of the author(s) alone and do not necessarily reflect the views of the International Criminal Tribunal for the Former Yugoslavia or the Association of Defence Counsel Practicing Before the ICTY.*

## ICTY CASES

### *Cases at Trial*

Hadžić (IT-04-75)

Karadžić (IT-95-5/18-1)

Mladić (IT-09-92)

Šešelj (IT-03-67)

### *Cases on Appeal*

Popović *et al.* (IT-05-88)

Prlić *et al.* (IT-04-74)

Stanišić & Simatović (IT-03-69)

Stanišić & Župljanin (IT-08-91)

Tolimir (IT-05-88/2)

## Prosecutor v. Mladić (IT-09-92)

From 17 March to 19 March, both the Defence and Prosecution made their submissions in relation to Rule 98 *bis* in the *Mladić* case. At the close of the Prosecution's case, the Trial Chamber can enter a judgement of acquittal on counts in the indictment if there is no evidence capable of supporting a conviction.

The Defence began its submissions with referring to the start of the Defence case, which is scheduled for half-May, by stating that: "General Mladic believes in the truth, and that we will be able to present that truth, and that once presented it will demonstrate his innocence."

The Defence submissions covered the interpretation of 98 *bis* parameters, by arguing that Trial Chamber should consider taking a charge-based approach. Furthermore, the Defence addressed the Jadar River incident and the Sirokaća shelling, as well as the Prosecution's individual charges as to religious sites. Also, the Defence argued that no case had been made demonstrating the responsibility of Mladić for various Ministries of Interior (MUP) and paramilitaries. The Defence concluded their submissions by addressing the two genocide counts in the indictment in relation to Srebrenica and seven municipalities. More specifically, the Defence challenged the framework of a third category Joint Criminal Enterprise (JCE) in which Mladić is charged with genocide.

### ICTY Rules of Procedure and Evidence

#### Rule 98 *bis*

At the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction.

## ICTY NEWS

- [Mladić: 98 \*bis\* Hearing](#)
- [Karadžić: Final Briefs and Closing Arguments scheduled](#)

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The Prosecution responded to the various Defence submissions. First, the Prosecution stated that a new approach to Rule 98bis would not be desirable as it concerns one of the final cases before the Tribunal and that precedent does not permit addressing individual charges. Furthermore, their submission cen-

tered around the assumption that Mladić's intent was demonstrated by the promotion of certain officers in the Army of the Republika Srpska (VRS) that participated in certain crimes. Lastly, the Prosecution cited case-law previously confirming charges of genocide within a third category JCE framework.

### Prosecutor v. Karadžić (IT-95-5/18-I)

While the *Karadžić* trial is still adjourned, the Trial Chamber has set the dates for the filing of the final briefs and the beginning of closing arguments for 29 August and 29 September, respectively.

As a part of the closing arguments, the parties will file their final briefs containing factual and legal argu-

ments and their final proposal to the Trial Chamber.

The fact that these dates have been already set means that there will be no more witnesses testifying in the *Karadžić* trial. It also makes it very probable that the final Judgement in the case will be pronounced in 2015.

## LOOKING BACK...

### International Criminal Tribunal for the Former Yugoslavia

Ten years ago...

On 6 April 2004, the initial appearing of the six Accused Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić was held at the ICTY after they were transferred to the ICTY Detention Unit the day before. They all plead not guilty to the 26 counts in the indictment.

The six Accused were charged both on the basis of individual, as well as superior criminal responsibility under Articles 7(1) and 7(3) of the Statute for crimes allegedly committed in the villages of Sovići and Doljani, the Heliodrom and Vojno camps and the Dretelj and Gabela District Military Prisons, which constitute crimes against humanity, violations of the

laws and customs of war and grave breaches of the Geneva Conventions. In May 2013, the six Accused were convicted to sentences ranging from 10 year to 25 years. The case is currently on appeal at the ICTY and the English translation of the Frech Judgement is still pending.



*The Prlić et al. Case*

### International Criminal Tribunal for Rwanda

Fifteen years ago...

On 1 April 1999, the former Bourgmestre of Mabanza, Ignace Bagilishema plead not guilty to the thirteen counts of his indictment issued by the ICTR. Bagilishema was charged with crimes against humanity, conspiracy to commit genocide, genocide

and violations of Article 3 Common to the Geneva Convention and of Additional Protocol II. He was alleged to have, *inter alia*, murdered, assisted and conspired to murder Tutsis during the months April until June 1994.

Bagilishema had previously surrendered himself to the International Criminal Tribunal for Rwanda on the 16 February 1999 and was arrested on 20 February and transferred to the Tribunal's Detention Facility in Arusha. His trial opened on 27 October 1999.



*Ignace Bagilishema*

On 7 June 2001, the Trial Chamber acquitted Bagilishema of all counts he was charged with, this being the first acquittal ever handed down by the ICTR. During the subsequent appeal lodged by the Prosecutor, all grounds for appeal were rejected by the Appeals Chamber of the ICTR, therewith confirming the acquittal of Bagilishema.



## NEWS FROM THE REGION

### *Bosnia and Herzegovina*

#### **New Mass Grave Discovered**

A possible new mass grave was discovered in Oborći, near the town of Donji Vakuf, by Bosnian forensic experts. The grave contains the remains of 150 Bosnian Muslims. Lejla Čengić, an official affiliated with the Institute for Missing Persons, communicated that the grave is likely to concern civilians killed in Kozarac during the war, a town in the Prijedor region inhabited by 98 percent Bosniaks. These killings took place in 1992 in relation to the Serb take-over of the Prijedor region.



*Mass Grave in the Prijedor Region*

Last year another mass grave was discovered in Prijedor. The Tomašica grave held the corpses of 435 Bosnian Muslims and Croats. With the means of DNA analysis 50 bodies have so far been identified. In the Prijedor region alone, 96 mass graves have been discovered previously, leading to the identification of 2.100 remains.

The official exhumation of the grave discovered in Oborći will commence soon.



### *Croatia*

#### **Alleged War Criminal Gojko Eror Extradited to Croatia**

Alleged war criminal Gojko Eror has been extradited from Malta, where he had been living for the past eleven years. He was transferred to a Croatian prison in Osijek, following a European Arrest Warrant issued for, amongst others, crimes against humanity. Eror is charged with torture, unlawful confinement and abduction. In addition, charges are brought against him relating to the disappearance of 17 people in Berak, near Vukovar. Eror was born in Vukovar and consented to the extradition. The town of Berak was occupied during the war, which led to the death of 34 civilians. These crimes took place between 1992 and 1993.



*Gojko Eror*



## Croatia - Serbia Genocide Lawsuits Expected to Fail



Croatia's genocide lawsuit against Serbia before the International Court of Justice has brought little enthusiasm on the streets of Zagreb. Commentators have noted that it would be impossible to convincingly clear genocidal intent from both sides. This is a similar sentiment shared by citizens on the streets of Belgrade, as there is a perception that both sides will struggle to demonstrate that genocide had taken place in light of the past International Court of Justice decision that did not find Serbia responsible for the genocide in Srebrenica.

Genocide charges were first filed by Croatia against Serbia in 1999, that demanded Belgrade punish alleged war criminals during the 1990's conflict and return looted cultural property, as well as provide war time compensation. In response to this, Serbia filed a counter-claim in 2010 stating that Croatia was itself guilty of committing genocide against Serbs during, as well as after the war.

In contrast to the sentiments on the streets of both capitals, representatives of the Croatian and Serbian governments have demonstrated that they are confident in the presentation of their cases.

## NEWS FROM OTHER INTERNATIONAL COURTS



### *International Criminal Court*

#### **Situation en République Démocratique du Congo Affaire *Le Procureur c. Germain Katanga***

*Philipp C. P. Müller, Intern, Office of the Public Counsel for the Defence, International Criminal Court*

*The views expressed herein are those of the author(s) alone and do not necessarily reflect the views of the International Criminal Court (ICC).*

On 7 March, Trial Chamber II of the International Criminal Court rendered its judgement in the case of *Germain Katanga*, in which it found the Accused guilty as an accessory to four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging) and one count of crimes against humanity (murder) committed by a group acting with a common purpose pursuant to Article 25 (3) (d) of the Rome Statute.

At the same time, Katanga was acquitted of charges of rape and sexual slavery as war crimes and crimes against humanity, as well as of the crime of using children under the age of 15 to participate actively in the hostilities as a war crime. The crimes were alleged to be committed in the course of the attack on Bogoro, Democratic Republic of Congo (DRC), on 24 February 2003. Katanga had been in ICC detention since his surrender to The Hague on 17 October 2007, and for most of the proceedings his case was joined with

that of *Mathieu Ngudjolo Chui*, who was alleged to have been involved in the attack. The case had attracted considerable attention when, on 21 November 2012, after the hearings and the evidentiary phase had already been

finalised, the Chamber severed the charges against both Accused, announced that it was contemplating a change in the mode of liability under which Katanga stood charged from principal to accessory liability, and a little later acquitted Ngudjolo.

The Chamber found that the crimes charged had been committed by a group of combatants of Ngiti ethnicity from the collectivité of Walendu-Bindi. The Ngiti, alongside the Lendu, had been involved in ethnic strife with the Hema and its Union of Congolese Pa-



*Germain Katanga*

**Rome Statute****Article 25 (3) (d)**

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

In any other way contributes to the commission or attempted commission

of such a crime by a group of persons acting with a common purpose. Such

contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal

purpose of the group, where such activity or purpose involves the

commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime

triotis (UPC) militia, whom they perceived to be conspiring to submit their territory in order to create a “Hema-Tutsi empire.” The threat of attacks by the UPC had provoked the formation of local self-defence groups; in order to facilitate the cooperation with local armed and political groups, notably the Congolese Rally for Democracy – Liberation Movement (RCD-ML) and its military wing Congolese Popular Army (APC), these groups became gradually integrated in a more organised armed group named Patriotic Force of Resistance in Ituri (FRPI). Katanga was found to have played a decisive role in this process by protecting FRPI inter-

ests in the negotiations, mediating between the armed groups and the local commanders, and facilitating the delivery of weapons from these groups to the FRPI.

Though the Chamber found that Katanga had assumed the title of Commander-in-Chief of the village of Aveba, as well as President of the FRPI, it did not find that he had effective hierarchical power over all Ngiti commanders and combatants in the collectivité, nor that he had actually been present in Bogoro during the attack. Still, the Chamber found that the Accused’s involvement warranted criminal responsibility for his assistance to the common plan of the FRPI to attack Bogoro.

Specifically, the Chamber found that it had been es-

tablished beyond a reasonable doubt that the crimes charged had been committed by Ngiti combatants in Bogoro in pursuit of their common plan to attack Bogoro and expel both the UPC combatants and the Hema population from the village. Katanga’s actions were considered to have had a significant influence on the commission of the crimes. On the other hand, the Chamber found that the crimes of rape and sexual slavery did not form part of the common plan of the FRPI. Thus, Katanga could not be held responsible. He was further acquitted of the war crime of using child soldiers. The Chamber found that because a legal recharacterisation from direct perpetration to accessoryship would go beyond the facts of the case, Katanga’s responsibility had to be established as a principal perpetrator, which the Prosecution had failed to do.

Judge Van den Wyngaert delivered a strongly dissenting minority opinion, in which she reaffirmed her views on the legal requalification of the facts, which she had expressed since the notice of 21 November 2012. She argued that the facts relied on exceeded the scope of the charges confirmed by the Pre-Trial Chamber, and

infringed on Katanga’s right to a fair trial. In particular, the heavy reliance on the Accused’s own testimony which he had made in the expectation to be tried as a principal, the very late timing of the notice that the facts may be subject to a legal recharacterisation, the lack of opportunity for further defence investigations, and a perceived violation of Katanga’s right to be tried without undue delay were reprehended by the Judge.

Furthermore, she held that even if Katanga had stood lawfully charged as an accessory under Article 25 (3) (d), the majority had misread both the law and the facts of the case, and he would have had to be acquitted for lack of reliable evidence beyond a reasonable doubt.



*Judge Van den  
Wyngaert*





## *Extraordinary Chambers in the Courts of Cambodia*

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In preparation for the second trial in Case 002, three medical experts have been appointed at the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia to ascertain the health and fitness of the two accused persons in Case 002, Nuon Chea and Khieu Samphan. According to the Trial Chamber's 17 February decision Dr Seena Fazel, forensic psychiatrist from the United Kingdom, geriatrician Dr Chan Kin Ming from Singapore and Cambodian psychiatrist Dr Huot Lina have been assigned the task of examining the physical and mental health of former deputy secretary of the Communist Party of Kampuchea, Nuon Chea, and the former Head of State, Khieu Samphan, on 24-25 March. On the final day of the examinations the three experts are expected to issue a medical report, commenting on "the suitability of the physical conditions" and if necessary suggesting any suitable adjustments, such as "the provision of audio-visual facilities", and medically appropriate sitting hours for the Accused. If the parties request it, they will be permitted to question the experts' conclusions in the report during a public hearing held by the Trial Chamber on 28 March. This was decided after the Defence team's submissions and a response by the Prosecution on the fitness of the accused persons were reviewed by the Chamber.

In a written submission Khieu Samphan's Defence team claims that he is now no longer able to attend the trial for four successive days each week as he becomes very tired and has a limited attention span. Thus Khieu Samphan has mostly remained in the courtroom throughout the trial proceedings, but the team has requested a reduced trial schedule of four mornings per week from 9 am to 1 pm or three full trial days per week, as opposed to four. The team has referred to Khieu Samphan's recent hospitalisation for a respiratory tract infection. However, the Trial Chamber notes that in February, the Defence Counsel claimed that the Accused is in good health during a public hearing. In response to the claims of the De-

fence, the Prosecution has claimed that the Defence team has failed to present adequate medical proof that his health is deteriorating and therefore a comprehensive fitness assessment is unnecessary. The Prosecution agrees to a limited trial schedule while an appeal against the Trial Judgement in Case 002/01 is prepared, expected to be issued by mid-2014.

Meanwhile, Nuon Chea's Defence team has sought a comprehensive assessment of his health condition in order to establish his ability to participate in trial proceedings, as the team claim that Nuon Chea's "current medical ailments cause him pain and discomfort." Should he be found fit to stand trial, the team further desires that the Chamber schedule trial hearings exclusively in the morning hours, commencing at 07.30 pm. Nuon Chea was last examined by medical experts a year ago and was declared fit to stand trial, although, in addition to heart problems he was found physically frail with "longstanding degenerative back problems and poor muscle bulk." Nuon Chea has since participated in trial proceedings in Case 002/01 from his bed in a cell.

The case against the two accused commenced in June 2011 but, in order to render it more expedient and efficient, the case has since been separated into smaller component parts. The first trial started in November 2011 and concluded in October 2013, and primarily concerned two periods of population movement. The Trial Chamber is now considering a number of pre-trial issues before fully establishing the scope of trial in Case 002/02 and trial schedule.

In the Case 004 John R.W.D. Jones QC, who acted as Defence Counsel in five cases before the International Criminal Tribunal for the former Yugoslavia, was appointed by the Defence Support Section to represent Suspect named in the Third Introductory Submission filed by the International Co-Prosecutor. Jones is a London-based barrister specialising in war crimes, counter-terrorism and extradition.

## DEFENCE ROSTRUM

### The Thirteenth Defence Symposium

*By Martijntje Holscher*

On 12 March, the ADC-ICTY hosted a Defence Symposium on Criminology and International Criminal Law. Prof. Dr. Alette Smeulers from Tilburg University gave a lecture about her research on perpetrators of international crimes. The lecture was attended by twenty Defence interns and staff.

Smeulers' research demonstrates that alleged perpetrators are often ordinary people within extraordinary circumstances. The social context is crucial in the transformation from being an ordinary person to committing a crime.

Individuals are influenced by their social, political and ideological context. This context shapes them but is also, in turn, shaped by people. Armed conflict has additional effects on individuals such as fear, anger, and uncertainty. At the same time it can give people feelings of freedom, power and a so-called "combat high." Smeulers emphasised that armed conflict has a unique dynamic and can cause escalation and brutalisation of violence, which may spiral into mass atrocities.

For her research, Smeulers studied a large number of alleged and convicted perpetrators. She looked at the different roles and motives displayed on different levels of power. Based on that, she developed the following categories of perpetrators: (1) criminal mastermind, fanatics, and devoted warriors, whose main motive is ideology or hatred; (2) careerists, profiteers, criminals and sadists, whose main motive is self-interest; (3) professionals, conformists and followers, and compromised perpetrators, whose main motive is fear.

Besides the category of sadists and criminals, Smeulers explored the question why so many ordinary, otherwise law-abiding citizens, turn into perpetrators during armed conflict?

As mentioned above, social pressure has a huge impact. Several experiments have shown just how strong this social impact of group pressure to obey and

atrocities producing situations really are. (see the *Ash Experiment*, *Milgram Experiment*, and *Zimbardo's Prison Experiment* respectively).

The question was raised whether our conscience would stop us. Smeulers explained that the pity and guilt felt on the one hand and the acts committed on the other hand create an uncomfortable dilemma in our mind (*cognitive dissonance*). One solution to reduce this inconsistency between feelings and actions is to stop committing these acts, but in a situation of pressure this is not always a safe option. The other solution is to soothe the conscience by rationalising and justifying the acts.

This justification of force, both on the individual level to soothe the conscience, and on the societal level regarding the ideological context is interesting. To justify the force, the classic "us vs. them" categorisation is often deployed. The "others" in armed conflict are the enemy and the de-humanised. Whereas people often identify themselves with places (us here vs. them there), in non-international armed conflict this distinction is not always the case. In this type of conflict, for example neighbours or co-workers who used to belong to the same "us here" are transformed into "them".

These categories are thus not fixed, but can change over time. The "us vs. them" categorisation is not only very destructive when it leads to armed conflict; but in every day societal life it can very well lead to discrimination. This binary thinking is said to enable simplification in our complex lives and is also part of self-identification by defining who you are by where or which group you belong to. It is also said that this binary thinking is a remnant of our primal instinct to protect our family group from potential harmful outsiders. But whatever the reason or the cause is, it is clear that it can have devastating effects. So in order to keep the "us vs. them" mentality in check, it seems wiser to focus more on what we all have in common, and in a way create a more inclusive and global "us".

## BLOG UPDATES AND ONLINE LECTURES

### Blog Updates

Michael G. Karnavas, **The Co-Prosecutor's attempt to eviscerate the principle of legalism at the ECCC... and beyond**, 1 April 2014, available at: <http://tinyurl.com/opgps24>.

Reka Hallos, **ICC: Kenyatta Trial Adjourned until October**, 1 April 2014, available at: <http://tinyurl.com/q4h89df>.

Rosalind English, **International Court of Justice orders Japan to suspend its Antarctic whaling program**, 31 March 2014, available at: <http://tinyurl.com/393c2lm>.

Student Editor, **Guest Post: Crimea Secession Claims, Right to Self-Determination and the Kosovo Precedent**, 20 March 2014, available at: <http://tinyurl.com/.p5pamdo>

### Online Lectures and Videos

"A Conversation with Judge Marilyn Shea-Stonum" published on 27 March 2014, available at: <http://tinyurl.com/qxl7fxn>.

"A Conversation with Edward Snowden's Legal Advisor", by Ben Wizner, published on 27 March 2014 available at: <http://tinyurl.com/oc37wlp>.

"Toby Landau QC on arbitration and human rights", by Toby Landau, published on 28 March 2014, available at: <http://tinyurl.com/nq3q8cq>.

"Risk and Military Planning", published on 28 March 2014, available at: <http://tinyurl.com/myacl4m>.

## PUBLICATIONS AND ARTICLES

### Books

Marco Roscini (2014), *Cyber Operations and the Use of Force in International Law*, Oxford University Press.

Eibe Riedel, Gilles Giacca, and Christophe Golay (2014), *Economic, Social and Cultural Rights in International Law*, Oxford University Press.

Reid Griffith Fontaine (2014), *The Mind of the Criminal*, Cambridge University Press.

Celia Wells and Oliver Quick (2014), *Reconstructing Criminal Law*, Cambridge University Press.

### Articles

Robert Cryer (2014), "Witness Tampering and International Criminal Tribunals", *Leiden Journal of International and Comparative Law*, Vol.27, No. 1.

John Jackson and Yassin M'Boge (2014), "Integrating a Socio-Legal Approach to Evidence in the International Criminal Tribunals (Part 2)", *Leiden Journal of International and Comparative Law*, Vol. 27, N. 1.

Scott Robinson (2014), "International Obligations, State Responsibility and Judicial Review Under the OECD Guidelines for Multinational Enterprises Regime", *Utrecht Journal of International and European Law*, Vol. 30, N. 78.

## CALL FOR PAPERS

The **European Conference on Politics, Economics, and Law** invites submissions on a theme: "Individual, Community & Society: Conflict, Resolution & Synergy."

Deadline: 15 May 2014

More info: <http://tinyurl.com/ppu4auw>.

The **American Society for Legal History** invites proposals on any facet or period of legal history, anywhere in the world.

Deadline: 1 July 2014

More info: <http://tinyurl.com/nco578d>.



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Any contributions for the newsletter  
should be sent to Isabel Düsterhöft at  
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GOODBYE

*The ADC-ICTY would like to express its appreciation and thanks to Dennis Levy Lazarus for his hard work and dedication to the Newsletter. We wish him all the best in his future endeavours.*

**EVENTS****SCL Lecture “Genocide Prosecution in a National Court”**

Date: 9 April 2014

Location: T.M.C Asser Institute, The Hague

More info: <http://tinyurl.com/pkd5apq>.

**A Conversation with International Court of Justice Judges**

Date: 11 April 2014

Location: The Hague Institute for Global Justice, The Hague

More info: <http://tinyurl.com/nte8t5g>.

**SCL Lecture “Addressing Crimes against the Environment under the Rome Statute”**

Date: 23 April 2014

Location: T.M.C Asser Institute, The Hague

More info: <http://tinyurl.com/qd6dk77>.

**OPPORTUNITIES****Associate Legal Advisor (P2), The Hague**

International Criminal Court (ICC) – Presidency,

Closing date: 28 April 2014

**Associate Victims Officer (P2), The Hague**

International Criminal Court (ICC) - Office of the Prosecutor

Closing date: 30 April 2014

**Programme Officer (P3), Vienna**

United Nation Office of Drugs and Crime

Closing date: 1 June 2014