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Head of Office: Isabel Düsterhöft
Assistants: Vesselina Vassileva and Laura Burmeister
Contributors: Dilyana Apostolova, Walleska Pareja Díaz, Simeon Dukić, Molly Martin, Philipp Müller, Yoanna Rozeva, Paul Stokes, Camille Sullivan, Lucy Turner
Design: Sabrina Sharma

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Prosecutor v. Mladić (IT-09-92)

On 16 May, the Trial Chamber handed down its decision on the Defence motion for certification to appeal the Chamber's decision under Rule 98 *bis*. On April 22, the Defence filed the motion on the grounds that the Chamber failed to provide a well-reasoned justification for inferring genocidal intent on the part of the Accused in relation to Counts 1 and 2 of the indictment. In particular, the Defence argued that the Chamber failed to substantiate direct evidence relating to the Accused and erroneously considered evidence of two unreliable witnesses. In response, the Prosecution submitted that whilst the Chamber is not obliged to provide direct evidence pertaining to the Accused, it did cite evidence relating to several different crimes in its decision. The Chamber made a decision under Rule 73 (B) to certify the Defence's right to appeal. The Chamber considered that for the fair and expeditious conduct of the proceedings any erroneous decision is best determined at this stage as the issue of on appeal would significantly affect the outcome of the Trial.

ICTY Rules of Procedure and Evidence

Article 73 (B)

Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

Some preliminary matters were dealt with before the Defence began presenting its case in the proceedings against Mladić on 19 May. In particular the Prosecution

ICTY NEWS

Also in this issue

submitted a proposal for the admission of cross-examination testimony of Defence witnesses who testified in the *Karadzić case*. The Defence then called its first witness, Mile Sladoje, Assistance Commander for his Battalion in the Illidza Brigade within the Sarajevo-Romanija Corps. Sladoje testified that his Battalion had a standing order to only open fire in response to enemy offensive and only fire at identified military targets. On cross-examination the Prosecution presented evidence of an order issued by Dragomir Milosević for the Army of Republika Srpska(VRS) to independently prepare an attack on Sarajevo. Sladoje stated, however, that this order was never received in his Battalion and may relate to fire for tactical purposes rather than an unprovoked offensive. Sladoje also testified that from the VRS positions there was no direct line of vision to Getes Street in Alipašino. The mortars that fell at incident G6 on 22 January 1994 originated from Army of the Republic of Bosnia and Herzegovina (ABiH) territory to the west of Getes Street. In the process of the cross-examination the witness was questioned on his personal knowledge of this event, having revealed he was not sure of his exact location on that day.

Witness Trapara was called by the Defence on 20 May. Trapara was the Commander of the 2nd Infantry Battalion of the 1st Sarajevo Mechanised Brigade. He testified that no order was ever issued or received to terrorise the civilians in Sarajevo. Orders were only ever received to fire at legitimate military targets in defensive actions. As Commander Trapara confirmed on cross-examination he never called for mortar action in response to sniper fire and his Battalion did not have a trained sniper unit. Trapara also testified that orders were received from Karadžić and military authorities that all humanitarian convoys were to pass through the territory of the VRS. On cross-examination the Prosecution presented evidence of a communication claiming that Mladić was obstructive to the delivery of humanitarian assistance although Predrag maintained that he had no knowledge of this at the time.

The Defence also called witness Dusan Skrba, a reserve officer of the Yugoslav People's Army (JNA) who was appointed Commander of the 1st Romanija Brigade artillery battalion. Skrba testified about the functions of the chain of command within his Brigade. He described the use of heavy weaponry by the ABiH around Sarajevo, in particular the use of a T-55 tank, which was concealed in wooded area near Bjelimići and that no orders were given to fire within the area unless it was targeted after a citing of the tank. The witness also affirmed that there was a standing order not to fire at civilian targets in Sarajevo and an order to attack public transport was never received. The Prosecution questioned Skrba on the alleged VRS blockade of Sarajevo, citing an intercept between Mladić and another individual where he claims to have Sarajevo blocked from four corners. Skrba was able to demonstrate in Mladić's Defence that Sarajevo was only under military blockade as civilians were able to leave the city and communication and power supplies remained intact.

On 22 May, Branko Radan, former President of the Executive Board of Novo Sarajevo municipality testified. Radan described the conditions in the Grbavića immediately before and during the war. He explained that all civilians received equal pensions, humanitarian aid, medical services and food regardless of ethnicity, therefore indicating that Muslims were not discriminated. The witness also demonstrated how efforts were made to arrest a group of nine Serbian men, including Veselin Vlahović, also known as Bratko, who were engaged in criminal activities in Grbavića. They were not affiliated with the Serbian army. Radan testified that the Muslim population was never expelled from Grbavića, but left voluntarily after an internal agreement. In cross-examination the Prosecution attempted to contradict evidence that the Serbs were not preparing for the war. Radan, although acknowledging the possibility, responded that he was unaware of the circumstances at the time.

Nikola Mijatović was called on 23 May to testify on the conditions in Sarajevo at the beginning of the war. He recalled being tipped off by neighbours of several murder plots against him as he was a prominent Serb living in Sarajevo and recounted other harassment and brutality towards Serbian civilians. Mijatović joined the Illidza Brigade after leaving Sarajevo. He testified that false information was given to the United Nations Protection Force (UNPROFOR), blaming attacks on a hospital and transformer station on Serbian soldiers. The witness also stated that the Office of the United Nations High Commissioner for Refugees (UNHCR) convoys were inappropriately used to transport weapons to Muslim forces. While the Prose-

cution questioned the accuracy of Mijatović's evidence on these particular issues, as well as his testimony on the number of military targets in Sarajevo, Mijatović was able to testify that Mladić gave orders insisting on discipline in the Sarajevsko-romanijskog korpusa (SRK) and adherence to the Geneva Conventions.

Finally, the Defence called Slavko Gengo, a member of the 1st Romanija Infantry Brigade. Gengo testified that ABiH snipers fired at civilians along the Vogosca-Hresa-Pale road and had weaponry located in areas inhabited by civilians. Similar to witnesses Sladoje, Trapara and Skrba, Gengo again testified that the VRS only initiated defensive actions and took measures to avoid civilian causalities. On cross-examination the witness was presented with an Order from Galić allegedly planning offensive operations. Gengo testified that this was not an unprovoked attack on the ABiH but rather tactical repositioning to regain territory. Gengo also testified for the Defence that the VRS provided protection for the Mošćanica Spring and maintained that water line was never cut off by the Serbs while he was present, despite evidence presented in cross-examination.

Prosecutor v. Karadžić (IT-95-5/18-I)

On 5 May, a *Motion for Bifurcated Judgement* was filed by Radovan Karadžić.

In this *Motion*, the Accused requested that in the event he is convicted, his verdict be determined in a separate sentencing Judgement and that all sides be allowed to address sentencing matters in written submission filed in a time span of seven days after any ruling of conviction.

On 15 May, the Office of the Prosecutor filed its *Response to Karadžić's Motion for Bifurcated Judgement*, which opposes the Defence Motion. Their main argument was that Rule 87(C) is irrelevant should the Chamber grant a bifurcated proceeding and that Rule 86 (C) precludes what is requested in the *Motion*.

On 9 July 1998, during the 18th plenary session of the Tribunal's Judges, the Judges adopted Rule 87 (C) and in December 2000, the final formulation of the Rule was adopted to read: "If the Trial Chamber finds the Accused guilty on one or more of the charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the Accused."

ICTY Rules of Procedure and Evidence

Article 86 (C)

The parties shall also address matters of sentencing in closing arguments.

On 22 May, the Trial Chamber issued its decision and denied the *Motion* pursuant to Rule 87 (C).

Prosecutor v. Prlić *et al.* (IT-04-74)

On 27 May, a status conference was held in the *Prosecutor v. Prlić et al.* case by Judge Theodor Meron, the Pre-Appeal Judge in the case. All Accused were present, though Counsel for Prlić attended *via* video-link from abroad. No issues related to health or detention conditions were raised. The primary issues that were addressed in the conference were the anticipated availability of the translation of the Trial Judgement and Slobodan Praljak's representation.

The Trial Judgement in *Prlić et al.* was issued by the Trial Chamber on 29 May in French. It is in six volumes, totalling 2.639 pages, including a 1.963-page majority opinion. Because the Defence teams for Jadranko Prlić, Bruno Stojić, Milivoj Petković and Valentin Ćorić are not proficient in French and due to the unprecedented length and complexity of the Trial Judgement, Judge Meron issued an extension for filing the Notices of Appeal in June 2013. Further, Praljak, Pušić and the Prosecution, all of whom filed their Notices of Appeal according to the traditional timeline last summer, have received an extension for the filing of their Appeals Briefs in an effort to harmonise the briefing schedule to avoid unfairness and

inefficiency. For the last year, June 2014 has been the anticipated date of issue for the English translation, and at the February status conference, Counsel for some of the Appellants requested a 30 days notice if the translation would be delayed. Despite June being less than a week away, no more specific release information was available at the status conference, though the Registry indicated to Judge Meron that the Judgement was still expected to be ready in June.

Slobodan Praljak

In a 28 April letter that had its confidential and *ex parte* status lifted by Judge Meron on 21 May, Praljak indicated to Judge Meron that he was withdrawing the power of attorney granted to his *pro bono* Counsel and would proceed to represent himself in the Appeal. During the status conference, Praljak's self-representation was confirmed and the Prosecution indicated that further disclosures would be made directly to Praljak and that a response to his letter would be issued within a day. Praljak is not proficient in French or English and requires a translation of the Trial Judgement in Croatian (BCS). He also indicated that he did not wish to receive disclosures that were not in BCS. The BCS translation of the Trial Judgement is expected to be issued in September 2014, though Counsel for Stojić commented on the desirability of having the two translations released more closely, as Stojić and other Appellants are also waiting for the BCS translation to take a more active role in assisting their Defence teams with their respective appeals.

This issue arises from Praljak's on-going disagreement with the Registry over his ability to afford private Counsel. Last summer, after his Defence team's submission of Notice of Appeal on his behalf, the Registry withdrew Tribunal-funded legal aid to Praljak and accounted that he owed remuneration to the Tribunal for the cost of his representation to that point. Praljak has persistently denied his ability to pay and has sought to have his Counsel reinstated, though on 4 April, the Appeals Chamber agreed with the Registry's assessment and decided that he was not entitled to legal aid. Until now, his previously Tribunal-appointed Counsel had continued to represent him *pro bono* but this representation has been limited to procedural matters. As such, Praljak has also moved for a stay of appellate proceedings pending his receipt of BCS translations of the Trial Judgement, his Notice of Appeal, and many other case file documents. The *Motion to Stay* was denied on 4 April by the Appeals Chamber as being unripe, because the stay of proceedings pending BCS translation of key documents would be a material issue only if Praljak was representing himself. During the status conference, Praljak tried to voice some concerns related to his on-going dispute with the Registry and offered Judge Meron a letter detailing several of his concerns, but Judge Meron preferred to address these matters more formally with written motions. It is not yet clear how Praljak's self-representation will affect the translations of documents into BCS or whether it will result in further changes to the briefing schedule.

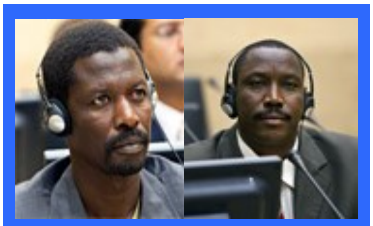
LOOKING BACK...

International Criminal Court

Five years ago…

On 18 May 2009, Bahr Idriss Abu Garda made his initial appearance before Pre-Trial Chamber I of the International Criminal Court (ICC). A summons to appear had been issued against him on 7 May 2009 and was unsealed ten days later. Abu Garda was the first Accused before the ICC in relation to the situation in Darfur, Sudan, which had been referred to the Court by the UN Security Council by means of Resolution 1593 on 31 March 2005. The Trial of a second Accused in the Darfur situation, Abdallah Banda Abakaer Nourain, was scheduled to start in May 2014. However, the commencement of the Trial was vacated on 16 April in view of logistic difficulties encountered.

Abu Garda was alleged to have committed war crimes of murder, pillaging and intentionally directing attacks against personnel, installations, material, units and vehicles involved in a peacekeeping mission. According to the Ofifice of the Prosecutor (OTP), the charged acts had taken place on 29 September 2007 in an attack against the African Union Mission in Sudan (AMIS) at the Haskanita military group site (MGS) in Haskanita village, North Darfur. The attack was allegedly carried out *inter alia* by splinter forces of the Justice and Equality Movement (JEM), who were supposedly under the command of Abu Garda. As a result, the OTP alleged his responsibility for the crimes committed in the course of the attack as a Co-Perpetrator, or indirect Co-Perpetrator, together with other senior commanders of the JEM and the Sudan Liberation Army (SLA).



Abdallah Banda Abakaer Nourain and Bahr Idriss Abu Garda

On 8 February 2010, the Pre-Trial Chamber declined to confirm the charges against Abu Garda, because it considered that the Prosecution had failed to establish substantial grounds to believe that a common plan existed to attack the MGS Haskanita.

Special Court for Sierra Leone

Ten years ago…

On 31 May and 1 June 2004, the Appeals Chamber of the Special Court for Sierra Leone (SCSL) rendered two decisions relating to ongoing criminal proceedings before the Court in the case against Charles Taylor and against three alleged leaders of the Civil Defence Forces (CDF). In its first decision, the Chamber decided that Taylor, who had been President of Liberia until 11 August 2003, was subject to criminal proceedings before the Court in spite of his official position as a Head of State at the time when the proceedings were initiated. It thereby dismissed the argument raised by Counsel for Charles Taylor that due to his immunity, the Court did not have jurisdiction to issue an indictment against him. In this regard, the Chamber also clarified that the SCSL was not part of the domestic legal system of Sierra Leone, but a proper International Criminal Tribunal constituted under International Law.

Charles Taylor

The second decision, which was issued on 1 June 2004, dealt with the question raised by Counsel for Sam Hinga Norman in the CDF case, on whether the recruitment of child combatants had been a crime under International Law at the time of the acts charged in the indictment against Norman. The Chamber considered that the prohibition of the recruitment of child soldiers had already crystallised prior to November 1996, as demonstrated by its mentioning in a number of international legal instruments, including the 1990 African Charter on the Rights and Welfare of the Child.

Judge Geoffrey Robertson

It furthermore found that individual criminal responsibility for such acts, though not explicitly recognised in a statutory instrument before the adoption of the Rome Statute in July 1998, had already existed under Customary International Law in 1996. Judge Geoffrey Robertson dissented from the majority on this point, arguing that prior to the adoption of the Rome Statute no individual criminal responsibility had existed under International Law for the recruitment of child soldiers.

International Criminal Tribunal for the Former Yugoslavia

Fifteen years ago…

On 27 May 1999, the International Criminal Tribunal for the Former Yugoslavia (ICTY) announced that indictments had been issued against five high ranking officials of the Federal Republic of Yugoslavia (FRY); namely Slobodan Milošević,President of the FRY; Milan Milutinović,President of Serbia; Nikola Šainović, Deputy Prime Minister of the FRY; Dragoljub Ojdanić, Chief of Staff of the Yugoslav Army; and Vlajko Stojiljković, Minister of Internal Affairs of Serbia. They were charged with murder, persecution, and deportation as crimes against humanity, and the war crime of murder for acts allegedly committed in Kosovo against the Kosovo Albanian population. Next to their individual criminal responsibility under Article 7 (1) of the ICTY Statute, all, but Šainović, were also charged as superiors responsible for acts committed by their subordinated under Article 7 (3). The indictment had been submitted by the Prosecutor on 22 May 1999 and confirmed by Judge David Hunt two days later, who also granted an Office of the Prosecutor (OTP) request for late disclosure of the indictment until 27 May 1999.

As emphasised by the Prosecutor Louise Arbour in her application, the indictment was the first in the history of the Tribunal to be issued against a Head of State during an ongoing armed conflict for the alleged commission of serious violations of International Humanitarian Law. Further indictments were issued against Milošević for acts allegedly committed in Bosnia and Herzegovina, and Croatia respectively. On 1 April, he was arrested in Belgrade, though he was not transferred to the ICTY until late June. The proceedings against him were terminated following his death on 11 March 2006. Stojiljković died in 2002 while still at large.

ICTY Statute

Article 7 (1)

Individual Criminal Responsibility

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

The Trial Judgement against Šainović, Ojdanić, and Milutinović was issued on 26 February 2009. The Judgement entailed the acquittal of Milutinović and Ojdanić was sentenced to 15 years in prison for having aided and abetted two counts of crimes against humanity in Kosovo and was subseqently granted early release in 2013. Šainović was sentenced to a term of 22 years of imprisonment for four counts of crimes against humanity and one count of war crimes committed in Kosovo as part of a joint criminal enterprise, which was shortened to 18 years in January 2014 following the Appeals Judgement.

NEWS FROM THE REGION

Bosnia and Herzegovina, Croatia and Serbia

Flooding Across the Balkan Region

Mid-May was the start of one of the worst floods that the people in the Balkans experienced in more than a hundred years. The most affected places were Bosnia and Herzegovina (BiH), Serbia, and Croatia. During the flood, around 49 people were killed and almost 150,000 people were dislocated. There are close to 1.6 million people that have been affected by the flood, while 3.8 million are left without drinking water. The material damages are still being assessed but it is assumed that they could be around 1.48 billion $, with 3,500 kilometers of road damaged.

One of the most serious problems the authorities need to deal with is the displacement of the mines from the

Bosnian war between 1992-1995. It was reported that there are 120,000 mines that were left over after the war ended. On 21 May, the Mine Action Center (MAC) reported that one landmine went off overnight in the Brčko district, which highlights the danger and the swift operation the government needs to undertake in order to track and clean up the mines.

To address the problem, the BiH authorities stated that they will deploy drones to examine the mine fields in flooded areas in order to find the relocated mines during the flooding. This operation will be conducted by the MAC together with Belgian experts in such a way that drones will be equipped with cameras to fly over the affected mine fields. This operation has been carried out since 24 May and is ongoing.

Furthermore, there have been additional problems caused by the floods. Many courts and judicial institutions are damaged and trials have been suspended for the time being. Doboj, Prijedor, Bijeljina, Kakanj, Sanski Most and Gradačacare amongst the cities that have endured the worst damage.

The President of the District Court in Doboj, Duško Ninković, said that the floods have damaged files in the Court and Prosecution building. He also stated that the authorities are doing their best to save the documents on the ground floor. Most of the documents regarding the war were held on the upper floors and were not damaged.

Trial sessions in the Doboj Court have been put on hold and will resume after the sanitation of the building is complete. Time sensitive hearings such as detentions will be transferred to Teslić and other towns in the region. After the files have been dried, they will be moved to a more secure location.

Floods in the Balkan Region

To determine the damage of judicial institutions in flooded towns, members of Bosnia's High Judicial and Prosecutorial Council, the United States Agency for International Development and the European Union have visited institutions in Doboj, Prijedor, Bijeljina, Kakanj, Sanski Most and Gradačac.

Bosnia and Herzegovina

Five Year Jail Sentence for "Blue Eagles" Commander

The former Commander of the "Plavi Orlovi" (Blue Eagles) Milun Kornjača was sentenced to five years in prison for maltreating Bosniak civilians held in a metal container in Mostina.

He was found guilty of personally depriving civilians of their liberty by detaining them in a metal container in inhumane conditions. Koranjača was acquitted of murder and of the responsibility for punishing Veljo Tadić, a Blue Eagles paramilitary fighter, who killed 27 civilians on 19 May 1992.

The Prosecution was unable to prove beyond reasonable doubt that the Accused had effective control over Tadić, indicating that the orders were issued from the Čajniče Crisis Staff. Furthermore, Kornjača was also acquitted of contributing to the Brdo village civilian killings.

In deciding upon his sentence, the Court took into account that Kornjača had not been sentenced before and that he suffered from a heart disease. The time he spent in custody from 16 December 2009 to 30 August 2012 will be calculated in his sentence and the decision can now be appealed by the parties.

Verdict on the Sijekovac Killings

The Trial Chamber of the Court of BiH sentenced Zemir Kovačević to ten years in prison on 22 May. He was found guilty of killing two persons in Seijekovac on 26 March 1992, maltreating citizens that were taken out of their homes after an attack on the village and taking part in the pillaging of Serbian houses.

The Trial Chamber stated that the witnesses of the Prosecution testified "consistently and reliably" about the events in Sijekovac. Specifically, two witnesses, Milja Zečević and Saša Milošević, saw Kovačević kill Zečević's son and husband. Furthermore, he was found guilty of putting a pistol on the foreheads of two civilians in Sijekovac after the murders.

The Chamber determined that he committed these crimes in his capacity as a member of "an armed group", which later turned into the Interventions Squad of the 101st Bosanski Brod Brigade of the Croatian Defence Counsel (HVO). The Chamber also denied the Defence's argument that the war did not start in late March in Bosanski Brod, by stating that all elements of an armed conflict were present at the time of the killings.

The Judgement stated that Kovačević was guilty of participating in the pillaging of Serb homes in April 1992. Kovačević, however, was acquitted of charges that proclaimed his involvement in civilian forced labour because witnesses could not identify him as taking part in these cases.

Kovačević was sentenced to ten years in prison following the Criminal Code of the Former Yugoslavia. The time he spent in custody from October 2011 will be calculated in the sentence. Since this was a Trial Chamber's decision, the parties have the right to appeal the verdict to the Appellate Chamber of the Court of BiH.

Croatia

European Court of Human Rights Judgement in the Croatian Case Against Fred Marguš

On 27 May, the European Court of Human Rights in Strasbourg ruled that the Croatian Courts were in their right to start a new war-crimes trial against Croatian Army Commander Fred Marguš, almost nine years after his first trial was concluded, having been given an amnesty.

The European Court ruled that Marguš' rights to a fair trial according to the European Convention on Human Rights were not violated. The Court pronounced that there is a growing tendency in international law to see the granting of amnesties in respect of grave breaches of human rights as unacceptable.

The appeal in Strasbourg started in 2009, after an earlier complaint of Marguš' that his rights were violated was dismissed in Zagreb. He was charged in 1993 by the Osijek Military Prosecutor for committing serious offences against civilians, including murder, between November and December 1991, just as the war in Croatia was starting.

He was given amnesty in 1996, but the Croatian Supreme Court later revoked it, ruling that the link between the charges and the war were never proven, and hence he had no right to an amnesty.

In April 2006, he was charged by a Croatian court for killing four people in the autumn of 1991 and was sentenced to 14 years imprisonment. He appealed this sentence, but the ruling was confirmed on appeal and he was sentenced to an additional year, currently serving his jail sentence in Croatia.

NEWS FROM OTHER INTERNATIONAL COURTS

International Criminal Court

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

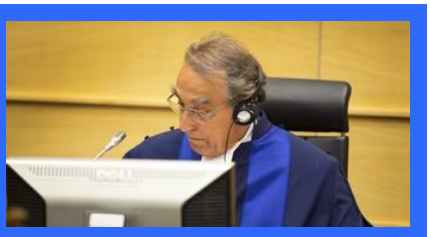
ICC Sentences Germain Katanga to a 12-year Jail Term

The second person to be convicted by the ICC, former Congolese militia leader Germain Katanga has been sentenced by the Court to 12 years in prison for arming an ethnic militia that carried out a village massacre in 2003.

Katanga received the sentence on 23 May, after having been found guilty in March of orchestrating a surprise attack on the village of Bogoro in the province of Ituri in the Democratic Republic of Congo (DRC).The Court found Katanga to have procured the weapons, including guns and machetes, for the fighters of the Patriotic Resistance Forces in Ituri (FRPI), the group responsible for the massacre in which over 200 villagers died. Katanga was, however, acquitted of direct involvement.

Presiding Judge Bruno Cotte stated, “the scars of the fighting that occurred that day are still be seen today.” He added that the use of machetes in the attack was "particularly cruel and caused extreme suffering.”

Katanga has been convicted by the Court of being an accessory to one crime against humanity (murder) and four war crimes (murder, attacking a civilian population, destruction of property and pillaging). He has also been acquitted of one crime against humanity (sexual slavery) and three counts of war crimes (using child soldiers, sexual slavery and rape). In a statement presented in the Court, Judge Cotte stated that the period that the 36-year-old former militia leader had spent in ICC custody (over six years) would be taken into account. The Chamber stipulated that Katanga would not be required to pay a fine.



Judge Bruno Cotte

ICC to Investigate Claims that British Troops Committed War Crimes in Iraq

The ICC has announced that allegations that British forces were responsible for a series of war crimes after the invasion of Iraq are to be examined by the ICC. The Court will now conduct a preliminary examination into an estimated 60 cases of alleged unlawful killing and claims that more than 170 Iraqis were mistreated while in the custody of the British military during the period of the conflict. The United Kingdom (UK) is now the first western state to face preliminary proceedings at the ICC.

British defence officials stated that they are confident that the Court will not progress to the next stage and announce a formal investigation, primarily because they stated that the UK has the capacity to investigate the allegations itself. The investigation will also involve some attention paid to the British police team responsible for investigating the accusations. The process of a preliminary examination can take several years.

The ICC specified, in a statement released on 13 May that "the new information received by the office alleges the responsibility of officials of the United Kingdom for war crimes involving systematic detainee abuse in Iraq from 2003 until 2008,” and that "the reopened preliminary examination will analyse, in particular, alleged crimes attributed to the armed forces of the United Kingdom deployed in Iraq between 2003 and 2008."

The decision by Fatou Bensouda, Chief Prosecutor at

the ICC, was taken after a complaint was lodged in January by the Germany-based human rights NGO the *European Centre for Constitutional and Human Rights* and UK-based *Public Interest Lawyers* (PIL). The latter represented the family of Baha Mousa, the Iraqi hotel receptionist tortured to death by British troops in 2003.

After a previous complaint in 2006, in which the ICC saw evidence indicating that British troops did commit war crimes in Iraq, the Court concluded, "there was a reasonable basis to believe that crimes within the jurisdiction of the court had been committed, namely wilful killing and inhuman treatment." However, at that point, the court decided that it should not take any further action, as there were fewer than 20

Fatou Bensouda

DEFENCE ROSTRUM

Refiguring the Perpetrator: Culpability, Postcolonial History and Africa's Impunity Gap

By Walleska Pareja Diaz

On 22 May, the International Humanitarian Law and International Criminal Law Section of the T.M.C. Asser Institute presented the lecture "Refiguring the Perpetrator: Culpability, Postcolonial History, and Africa's Impunity Gap" in The Hague. The event was part of this year's Supranational Criminal Law (SCL) Lectures Series that the Asser Institute co-organises in partnership with the Grotius Centre (Leiden University Campus Den Haag) and the Coalition for the International Criminal Court (CICC).

This SCL lecture was presented by Kamari Maxine Clarke, Professor of Anthropology and Law from the University of Pennsylvania, who explained that the preliminary remarks presented are part of a three year study founded by the Natural Science Foundation from the United States of America.

According to the author, the study suggests that an impunity gap exists in relation to proximity and temporality, overall in the Kenyan cases at the ICC. She explained that this gap is represented in the space between social time versus legal time and by the dynamic of the proximate actors versus commanders responsible for the actions of their subordinates. She also reflected on alleged perpetrators' images and how they have changed over time (see Thomas Lubanga and then Uhuru Kenyatta or William Ruto). Along with these thoughts, it was also debated how African countries, who are States Parties to the ICC, have signed the Rome Statute responding to different aims: in some way it has to do with their wishes to avoid repetition of crimes that shock the human conscience but also, in many cases state representatives sign treaties, such as the Rome Statute, to merely comply with requirements for International Monetary Fund's (FMI) loans and development aid or because of western political pressure. (sometimes invisible)

One of the strongest statements Clarke made during her lecture was related to the deep roots of violence in Africa. She stated that it is not only necessary to analyse the past decade's conflicts, but to go further back to the colonial era. She made the audience reflect on Africa's crimes through the prism of racism, colonisation, land eviction and patronage.

Coming from a former-colonised country, Ecuador, I can relate to a legacy of separatism and division embedded in our culture. Actually, it would be advisable that this kind of refreshing and honest assessments explained by Clarke could reach the ears of those powerful people who monitor international criminal justice privately, but not in any official capacity, avoiding to sign treaties that may threaten their interests.

As Clarke indicated: "the Kenyan cases at the ICC show us that the impunity gap can actually be explained through affective sentiments of solidarity in which Africans not only want to end violence, impunity and the abuses of the post-colonial elite, but also

want to reassert a new narrative about the political nature of contemporary violence in Kenya."

Once again, this begs to ask: "Is ICL fulfilling people's expectations?" As said during the lecture, the mandate of the different Tribunals, including the ICC, is clear and specific. Nevertheless, Clarke called for efforts to create a better system. She recalled that having a permanent International Criminal Court was also once a distant dream.

Undoubtedly, the lecture brought a number of interesting dilemmas inherent in International Criminal Law (ICL) to the audience's attention. ICL's contribution, legitimacy and validity seems to be still far from people's expectations of restoration and reconciliation in the aftermath of atrocities.

Clarke is sceptical of the potential justice produced by indictments and judgements that are often subject to temporary—content restraint. In this sense, she quoted the famous adage, an old wise saying, "We ask for justice you give us law".

As a lawyer, discarding the personal trust in the integrity of law, it has become clear that me that these two words are not synonyms. Nevertheless, courtrooms, black robes and bibs seem insufficient and victims deserve more, they deserve justice.

The Evolution of Command Responsibility Doctrine: Part I

By Paul Stokes

"Upon publication of his principles of war, Sun Tzu was summoned before a leading warrior king and asked to submit his theories to a test; Sun Tzu consented. Two companies of women, untrained in military matters, were formed up and each placed under the command of one of the king's favourite concubines. They were armed and given cursory instruction in the then-current manual of arms and close order drill. Then, to the sound of drums, Sun Tzu gave the order, "Right turn!" The only response of the "companies" was one of laughter. Sun Tzu remarked: "If the words of command are not clear and distinct, if orders are not thoroughly understood, then the general is to blame." Again uttering the same command and receiving the same response, Sun Tzu then declared: "If the words of command are not clear and distinct, if orders are not thoroughly understood, the general is to blame. But if his orders are clear, and the soldiers nevertheless disobey, then it is the fault of their officers." So saying and much to the consternation of the warrior king, Sun Tzu ordered the two company commanders beheaded and replaced by a member of each company. The execution was viewed by all, the drum was again sounded for drill, and the companies thereafter executed all maneuvers with perfect accuracy and precision, never venturing to utter a sound."

The concept of command or superior responsibility is a mode of liability, implicating the superior for his/her failure to prevent the crimes of his/her subordinates, which creates both a direct and indirect liability (respondent superior). The commander has a direct liability for the lack of supervision and an indirect liability for the criminal acts of others. Command responsibility doctrine has its basis in International Humanitarian Law, although command responsibility, as a concept, can be found, as seen above, in the era of Sun Tzu, and throughout military history. The 1474 Trial of Peter von Hagenbach, which saw him tried for a failure to prevent troops under his command from raping, torturing and murdering on the Upper Rhine, is regarded as one of the first international criminal tribunals. Despite Hagenbach's defence that his troops had not followed orders, he was beheaded due to his linkage to "crimes which he had the duty to prevent."

While its foundation in modern international law can be traced to the Hague Conventions of 1907 the doctrine's status under International Customary Law, however, is relatively young. According to Article 38(1) (b) of the International Court of Justice (ICJ) Statute, customary law follows from State practice, which is *opinio juris sive necessitatis*. It was not until post-World War II that the doctrine of command responsibility was clearly linked to criminal responsibility.

ICJ Statute

Article 38(1)(b)

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: international custom, as evidence of a general practice accepted as law.

The first Judgement that was made addressing the issue of superior responsibility was in the Trial against Japanese General Tomoyuki Yamashita. Yamashita was in command of the Japanese army in the Philippines from October 1944 until his arrest in September 1945. During fighting between United States troops and Japanese soldiers in Manila in February-March 1945, the Japanese forces tortured and murdered thousands of civilians. General Yamashita, who had previously moved his headquarters to Baguio, 125 miles north of Manila, claims that his communication with Manila was cut off and that he was oblivious to the fighting.

"[U]nlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against the people of the United States and of its allies and dependencies, particularly the Philippines."

When tried by the US Military Commission it found that Yamashita had "failed to provide effective control… as was required by the circumstances." The substantive basis for this was that the crimes committed violated the law of war. These violations were attributed to Yamashita by the command responsibility doctrine because:

"[T]he law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts… [and] … he may be charged with personal responsibility for his failure to take such measures when violations result…"

"Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates."

As the first Judgement addressing the issue of command responsibility there was bound to be criticism and debate following the trial. US Supreme Court Justice Murphy, in his dissenting opinion, explains:

"[T]here was no serious attempt to charge or to prove that he [Yamashita] committed a recognised violation of the laws of war. He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit the acts of atrocity. The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge. This indictment in effect permitted the military commission to make the crime whatever it willed dependent upon its biased view as to the petitioner's duties and his disregard thereof, a practice reminiscent of that pursued in certain less respected nations in recent years."

The Commission essentially alleges that although Yamashita did not know of the atrocities, "his ignorance created risks attributable to him." This risk-oriented approach and the broad liability standard employed in the Yamashita case has not been followed in post-Yamashita case law as we will see.

US v. Pohl et al., the fourth of the Subsequent Nuremberg Trials, referring to Yamashita, stated that:

"*The law of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the law of war*."

Both this case and *US v. Brandt et al.* further the doctrine in recognizing the command responsibility of civilians. It was in the *Hostage case*, that the Tribunal found that actual knowledge of the crimes committed was not a requisite. Rather, a "should-have-known standard was applied." Its reasoning was that a position of command implies control over a certain area of competence, and if offences are committed within this area of competency then the commanding officer is "obliged to know" about them, and should therefore intervene. The Judgement in the *High Command case* was more restrictive again in its standard, stating that "[t]here must be a personal dereliction…a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence." The trials at Nuremberg effectively rejected the standard set by Yamashita and, in the High Command case applied a standard of positive knowledge and in the Hostage case, a "should-have-

known" standard rather than the Yamashita "must-have-known" standard. This is not a distinction without a difference. After the Hostage and High Command cases, a superior's knowledge of "widespread atrocities constituting guilt under respondeat superior was rebuttably presumed, rather than irrebuttably presumed..."

Of course this standard has not always been met in subsequent case law. The massacre at My Lai represents a failure of the application of this standard and gives credence to a study by Prévost on command responsibility that the decision handed down by the US Military Commission in Yamashita was "influenced in large part by racism". On 16 March, 1968, US troops, under the command of William L. Calley Jr. and Ernest L. Medina, massacred the hamlet of My Lai. They had anticipated a Viet Cong stronghold but instead found only civilians. As Gary Solis writes "The soldiers took no incoming fire all day. Poorly trained, weakly led, and ill-disciplined, they began killing the unresisting noncombatants, raping and maiming many as they murdered approximately 350 Vietnamese."

Calley was convicted of murdering twenty-two civilians. However, Medina, who the day prior to the massacre had told his company to "leave nothing living behind them and to take no prisoners", was acquitted. At his court-martial the Prosecution urged that Medina knew, or should have known, of the massacre due to evidence that he was in a field adjacent to My Lai at the time. Not only this but they emphasised that in addition to inciting the massacre, he had taken no action to prevent or stop it, and no effort was made on his part to punish those who had committed crimes. Despite having seemingly met the standard established in the *Hostage and High Command cases* – knew or should have known – and even the Yamashita standard – must have known – US Army Captain Ernest L. Medina was acquitted. *To be continued in Issue 69*.

ASSOCIATION OF DEFENCE COUNSEL PRACTISING BEFORE THE ICTY

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BLOG UPDATES AND ONLINE LECTURES

Blog Updates

Michael G. Karnavas, **Karnavas files ECCC Amicus on Geneva Conventions Statute of Limitations,** 16 May 2014, available at: http://tinyurl.com/nqxmnx4.

Julien Maton, **Saif Gaddafi Must Be Tried in The Hague**, 22 May 2014, available at: http://tinyurl.com/ptckch9.

Celia Rooney, **Operation Cotton, War Crime and the Right to be Forgotten – the Human Rights Roundup**, 22 May 2014, available at: http://tinyurl.com/nyy47ge.

Reka Hollos, **ICC Sentences Germain Katanga to 12 Years' Imprisonment,** 24 May 2014, available at: http://tinyurl.com/ptckch9.

Online Lectures and Videos

"Keynote Address—CLP Celebrates 5th Anniversary with Chief Judge Jonathan Lippman", by Judge Jonathan Lippman, 22 May 2014, available at: http://tinyurl.com/mksfds4.

"Making Peace in the Middle East — Legally Speaking", by Dennis Ross, 23 May 2014, available at: http://tinyurl.com/oy77a3e.

"Constitutional Pluralism in the EU", by Klemen Jaklic, published on the 24 May 2014, available at: http://tinyurl.com/nyy47ge.

"Innovations in Refugee Protection", by Luise Druke, published on 24 May 2014, available at: http://tinyurl.com/q7rszox.

PUBLICATIONS AND ARTICLES

Books

Julie McBride (2014), *The War Crime of Child Soldier Recruitment,* T.M.C. Asser Press.

Mark Austin Walters (2014), *Hate Crime and Restorative Justice Exploring Causes, Repairing Harms, Oxford University Press.*

James Crawford and Martti Koskenniemi (2014), *The Cambridge Companion to International Law,* Cambridge University Press.

Janine Natalya Clark (2014), *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia,* Routledge.

Articles

Karim A. A. Khan, QC, Anand A. Shah (2014), "Defensive Practices: Presenting Clients Before the International Criminal Court", *Law and Contemporary Problems*, Vol. 76, No. 3 & 4.

Eirik Bjorge (2014), "Right for the Wrong Reasons: Silih v Slovenia and Jurisdiction Ratione Temporis in the European Court of Human Rights", *The British Yearbook of International Law,* Vol. 83, No. 1.

Paul Eden (2014), "The Role of the Rome Statute in the Criminalization of Apartheid", *Journal of International Criminal Justice",* Vol. 12, No. 2.

CALL FOR PAPERS

The **African Human Rights Journal** has issued a call for papers for its publication in November.

Deadline: 30 June 2014 More info: http://tinyurl.com/nmdx8bl.

The **12th Conference on 21st Century Borders**: Territorial Conflict and Dispute Resolution has issued a call for papers.

Deadline: 31 July 2014 More info: http://tinyurl.com/q4jehjv.

HEAD OFFICE

ADC-ICTY

ADC-ICTY
Churchillplein 1
2517 JW The Hague
Room 085.0870

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

NEW WEBSITE

The ADC-ICTY would like to express its appreciation and thanks to Dilyana Apostolova and Walleska Pareja Diaz for their hard work and dedication to the Newsletter. We wish them all the best in their future endeavours.

The ADC-ICTY would also like to thank ADC intern Laura Burmeister for her commitment to the Association and wonderful work on the newsletter over the past months. She will be missed and we wish her all the best!

EVENTS

Conference on the 21st Century Borders: Territorial Conflict and Dispute Resolution

Date: 13 June 2014

Location: Lancaster University, United Kingdom

More info: http://tinyurl.com/krwmqq9.

The Cross-Fertilisation Rhetoric in Question: Use and Abuse of the European Court's Jurisprudence by international Criminal Tribunals

Date: 14 June 2014

Location: Edge Hill University, Lancashire

More info: http://tinyurl.com/omkdaoy.

The Trial Record as a Historical Source

Date: 19 June 2014

Location: National Archives in the Netherlands, The Hague

More info: http://tinyurl.com/lu7ztqv.

OPPORTUNITIES

Associate Legal Officer, (P-2), Phnom Penh

Extraordinary Chambers in the Courts of Cambodia (ECCC), Chambers

Closing date: 6 June 2014

Associate Online Communications Officer, (P-2), The Hague

International Criminal Court (ICC), Registry

Closing date: 16 June 2014

International Cooperation Adviser, (P-3), The Hague

International Criminal Court (ICC), Office of the Prosecutor

Closing date: 19 June 2014