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NEWSLETTER

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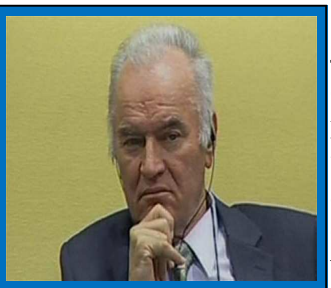
Prosecutor v. Mladić (IT-09-92)



Ratko Mladić

After a lull during the week of 14 September, the proceedings in *Prosecutor v. Mladić* commenced again on the 17 and 18 September with protected witness RM-066, followed by Edward Vulliamy, a reporter for the *Guardian* who had visited the camps in the Prijedor area. Vulliamy has testified for the OTP several times before and the Defence challenged his impartiality. Vulliamy responded that he was not neutral, but he was still impartial and that he had explained his position in his testimony in the *Karadžić* trial in November of last year. The following witness was Ibro Osmanović, who was detained in Vlasenica and later in the Susica and Batković camps. Defence counsel Mr. Stojanović attempted to show that the police, not the JNA were in charge of the daily running of the camps. Their testimony is followed this week by RM-051, an insider witness who served in the VRS at Manjaca and by witness Osman Selak, a professional soldier who served in the JNA from 1955 until 1992, who will testify to cooperation between the VRS and civilian authorities.

On 7 Sep 2012, the Trial Chamber granted the Mladić Defence access to confidential materials in 24 out of 33 cases included in its motion because of a sufficient nexus to the Mladić case. The overlaps between the prior cases and the Mladić case were established primarily on the basis of the indictment, the crimes charged, and the relevant JCEs and also on the basis of geographic or temporal overlap. Materials from several cases were not disclosed, as they concerned crimes

ICTY NEWS

- *Mladić*: Prosecution case continues
- *Karadžić*: Modalities of defence case
- *Hadžić* Status Conference

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dropped from the Mladić indictment or facts outside of the indictment, and the Defence had not established a "legitimate forensic interest" with regard to those materials. Materials in *Prosecutor v. Rasim Delić*, for example, were not disclosed, as Mladić was not charged with crimes in the municipalities of that case, which involved primarily ABiH offensives; similar conclusions were reached for the *Hadzisahanović* case and the *Halilović* case, among others. The Chamber also excluded Rule 70 material absent consent of relevant parties and delayed disclosure material, as well as several types of confidential sensitive material which was primarily administrative and had no forensic purpose, such as materials concerning remuneration or provisional release.

On 21 September 2012, the Trial Chamber admitted the transcript of an interview of Srdo Srđic by the OTP in 2002. Srđic was a high ranking SDS official in Prijedor and the Defence submitted that the transcript contained relevant and probative information regarding Mladić's knowledge and control of events in Prijedor and that it was sufficiently reliable to be admitted pursuant to 94 quater, since Srđic died in 2008. The Prosecution did not oppose the admission, but submitted that the transcript was unreliable and should be given little weight. The Trial Chamber granted the motion and admitted the transcript.

Prosecutor v. Karadžić (IT-95-5/18-I)

On 19 September 2012, the Trial Chamber in its 'Decision on time allocated to the accused for the presentation of his case' ordered Radovan Karadžić to present the totality of his evidence in 300 hours, partially granting his request in relation to the time sought to present his case. This figure includes the direct examination by Karadžić as well as any re-examination of his witnesses.

In considering the amount of time to grant to Karadžić to present his case, the Trial Chamber considered a number of factors. Firstly, it took into account the time used by Karadžić to cross-examine Prosecution witnesses. Secondly, the Chamber held that each single adjudicated fact does not need to be addressed during the defence case. It considered that most of these facts had already been discussed in the course of the Prosecution case and that Karadžić had the opportunity to cross examine Prosecution witnesses on these matters. The Chamber also underlined that while the taking of judicial notice creates a rebuttal presumption for the accuracy of the said adjudicated fact, the burden of proof remains with the Prosecution. Finally, the Chamber expressed concerns about the potential relevance and repetitive nature of the expected testimony of certain defence witnesses.

Karadžić and his team had originally requested 600 hours for the presentation of his case. Karadžić planned to call 600 defense witnesses and to use 300 hours for the examination in chief, plus an additional 300 hours to rebut the 2,300 adjudicated facts for which judicial notice has been taken.

Radovan Karadžić

The defence case is scheduled to commence on 15 October.

Prosecutor v. Hadžić (IT-04-75)

At the status conference held on 13 September the parties met before the Trial Chamber to discuss any matters arising before trial commences on 16 October. The main issues raised concerned translations, guidelines on the management of evidence and 92 *quater* materials.

Goran Hadžić

The court was concerned with the speed at which documents were being translated by the prosecution. The prosecution informed the trial chamber that the substantial majority of the documentation had now been translated and stated that it is prioritising documents for translation so that they are available for use in court as the trial progresses.

The court informed the parties that the Chamber's decision on the prosecution's motion for judicial notice of adjudicated facts and documents filed in July would be delivered in due course.

The pre-trial conference is to be held on 15 October 2012. At the commencement of the trial on the 16 October, the prosecution will deliver its opening statement, however, the defence has elected to make its opening statement at the start of the defence case.

Status Conferences

On 18 September 2012, Gotovina and Markač, who have been convicted of crimes against Serb civilians in Operation Storm in 1995, appeared before the Appeals Chamber, Judge Meron presiding, for a status conference. Judge Meron inquired as to the defendants' health, which was adequate, and noted that submissions and motions from July and August relating to potential conviction under alternate modes of liability would be considered in due course. No time frame is set for the final decision.

On 24 September 2012, Milan Lukić and Sredoje Lukić, convicted of crimes in Višegrad in 1992, appeared before the Appeals Chamber for a status conference. The conference was short and the Appeals chamber set a deadline for handing down the final appeals judgement by December of this year.

On Wednesday 26 September, the defendants in the Popović case, convicted of crimes in Srebrenica, appeared for a status conference.

NEWS FROM THE REGION

Bosnia and Herzegovina

Indictment confirmed in the case v. Predrag Milisavljević et al.

On 19 September 2012, the Court of Bosnia and Herzegovina confirmed the Indictment under which the Accused Predrag Milisavljević, Miloš Pantelić and Ljubomir Tasić are charged with the criminal offense of Crimes against Humanity.

The Indictment alleges, among other things, that Predrag Milisavljević and Miloš Pantelić, as members of the Reserve Police within the Public Security Station in Višegrad and Ljubomir Tasić, as a member of the Republika Srpska Army, are charged with having knowingly taken part in a widespread and systematic attack of the RS Army, Republika Srpska Police and paramilitary formations directed against the Bosniak civilian population in the municipality of Višegrad during the period from April to June 1992 during which they have persecuted Muslim population in the municipality of Višegrad on ethnic and religious grounds by way of undertaking: killings, forcible transfer of population, imprisonment, torture, coercing another by force or by attack against limb of life to engage in any form of sexual violence, enforced disappearance of persons and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to physical or mental health.

BiH

- *Indictment Confirmed in Milisavljević et al*

Serbia

- *Indictment for Kosovo Crimes Extended*

Serbia

Indictment for Kosovo Crimes Extended

The War Crimes Prosecutor's Office filed an indictment against Dejan "Bula" Bulatovic for war crimes committed against ethnic Albanian civilians in the villages of Cuska, Ljubenic and Zahac in Kosovo, on April 1 and May 14, 1999.

The indictment extended on September 27 specifies that members of the Jackals killed least 43 civilians in the village of Ljubenic, while they inflicted severe bodily harm on 12 civilians.

The prosecutor proposed that this case be merged with the Cuska case, since it is the same event and the same criminal act that Toplica Miladinovic et al are already being tried for, while he issued Bulatovic with the ban to leave his place of residence without the court's approval.

The defendants will enter their plea on the extended indictment at the next main hearing scheduled for October 29.

NEWS FROM OTHER INTERNATIONAL COURTS

ICTR
- Scheduling of Mugenzi and Mugiraneza appeal Hearing

STL
- Assignment of Counsel clarified after US Decision

SCSL
- AFRC Leaders guilty of contempt

International Criminal Tribunal for Rwanda

The views expressed herein are those of the author(s) alone and do not necessarily reflect the views of International Criminal Tribunal for Rwanda (ICTR).

Scheduling of Mugenzi and Mugiraneza Appeal Hearing

On 8 October 2012, the Appeals Chamber will hold a hearing in Arusha, Tanzania, in the 'Government II' trial.

Previously, on 30 September 2011, Trial Chamber II of the International Criminal Tribunal for Rwanda, composed of Judge Khalida Rachid Khan, presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short, delivered its Judgement concerning the four accused in the "Government II" case.

Casimir Bizimungu, the former Rwandan health minister, and Jérôme-Clément Bicamumpaka, the former foreign affairs minister in the Rwandan government during the 1994 genocide, were acquitted by the Trial Chamber as the Chamber found a lack of evidence to support their convictions. However, it upheld the conviction of two other ministers, Prosper Mugiraneza, the former civil service minister, and Justin Mugenzi, the former trade minister.

The Trial Chamber convicted both Mugenzi and Mugiraneza for conspiracy to commit genocide for their participation in the decision to remove Butare's Tutsi Prefect, Jean-Baptiste Habyalimana, and of direct and public incitement to commit genocide based on their participation in a joint criminal enterprise at the subsequent installation ceremony where President Théodore Sindikubwabo gave an inflammatory speech inciting the killing of Tutsis. They were each sentenced to 30 years of imprisonment.

The four ex-ministers had been jointly charged with a variety of crimes related to the 1994 killings of Tutsis. The crimes included genocide, conspiracy to commit genocide, complicity in genocide, direct and public incitement to commit genocide, crimes against humanity (murder, extermination and rape) and war crimes. In the present case, all four ministers had been accused of calling for the killing of Tutsis during radio announcements and in public meetings that were held across Rwanda. The trial took place between 2003 and 2008.

Special Tribunal for Lebanon

The views expressed herein are those of the author(s) alone and do not necessarily reflect the views of Special Tribunal for Lebanon .

On 13 September 2012, the U .S. Department of the Treasury imposed sanctions against Mustafa Badr AI-Din, designating him pursuant to Executive Order 13224 "for providing support to Hezbollah's terrorist activities in the Middle East and around the world". Executive Order 13224 provides, inter alia, that 'Any transaction or dealing by United States persons or within the United States in property or interests in property blocked pursuant to this order is prohibited, including but not limited to the making or receiving of any contribution of funds, goods, or services to or for the benefit of those persons listed in the Annex to this order or determined to be subject to this order [...] The terms "United States person" means any United States citizen'.

Following this event, on 18 September 2012, the defence counsel for Mr Badreddine filed an 'Urgent Request for Clarification of Whether Co-Counsel John Jones Can Continue to Represent Mustafa Amine Badreddine' where it requested the President of the Tribunal, Sir David Baragwanath, to seek clarification from the United States authorities on whether Mr. John Jones, a dual US/UK citizen, can continue to represent Mr. Badreddine before the Special Tribunal for Lebanon.

On 20 September 2012, the United States authorities issued the licence required for Mr Jones to continue to represent Mr Badreddine, one of the accused in the Ayyash et al proceedings.

Mr Badreddine's defence team can now continue to prepare for trial. The Defence will be able to present a final challenge to the Tribunal's legality on 1 October 2012 during the hearing scheduled before the Appeals Chamber.

The Pre-Trial Judge has set 25 March 2013 as the tentative date for trial to begin.

Special court for Sierra Leone

The views expressed herein are those of the author(s) alone and do not necessarily reflect the views of Special Court for Sierra Leone (SCSL).

Three AFRC Leaders found Guilty of Contempt

On 25 September 2012, three senior members of Sierra Leone's former Armed Forces Revolutionary Council (AFRC), two of them already serving sentences on convictions by the Special Court, have been found guilty of contempt for tampering with a former prosecution witness.

The judgment was delivered by Special Court Judge Justice Teresa Doherty from The Hague and streamed to courtrooms in Freetown and Kigali, Rwanda on a video-link.
Ibrahim Bazzy Kamara and Santigie Borbor Kanu, aka "Five-Five", are currently serving sentences of 45 and 50 years, respectively, at the Mpanga Prison in Rwanda on convictions for war crimes and crimes against humanity. They attended the hearings at the ICTR's courtroom in Kigali, while Hassan Papa Bangura, aka "Bomblast", and Samuel Kargbo, aka "Sammy Ragga", participated from the Special Court's courthouse in Freetown.

Kanu and Bangura were each found guilty on two counts of interfering with the administration of justice by offering a bribe to a witness, and for otherwise attempting to induce a witness to recant testimony he gave before the Special Court.

Kamara was convicted for attempting to induce a witness to recant his testimony and of knowingly violating a court order protecting the identity of a witness who had testified against him in the AFRC trial.

Justice Doherty will now schedule sentencing proceedings. Under Rule 77(G) of the Special Court's Rules of Procedure and Evidence, a person convicted of contempt faces a maximum sentence of seven years in prison, a maximum fine of two million leones (approximately $500), or both.

Rule 77: Contempt of the Special Court

(A) The Special Court, in the exercise of its inherent power, may punish for contempt any person who knowingly and willfully interferes with its administration of justice, including any person who:

(iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness;

LOOKING BACK...

International Criminal Tribunal for the Former Yugoslavia

5 years ago…

Mrkšić found guilty of aiding and abetting murders at Ovčara and Šljivančanin guilty of mistreatment, Radić acquitted

On 27 September 2007, the Tribunal's Trial Chamber sentenced Mile Mrkšić and Veselin Šljivančanin, former senior officers of the Yugoslav People's Army (JNA), to 20 years' imprisonment and five years' imprisonment, respectively, for their role in the crimes at Ovčara. The third accused, former JNA captain Miroslav Radić, was acquitted of all charges.

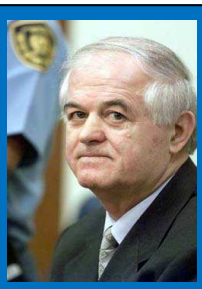
Mrkšić was found guilty of aiding and abetting the murder, torture and cruel treatment of 194 non-Serb prisoners of war who were taken from Vukovar Hospital following the fall of this Croatian city to JNA and Serb paramilitary forces in November 1991. Šljivančanin was convicted of aiding and abetting the torture of the prisoners. In a first review of an Appeals Judgment, Šljivančanin was sentenced to 10 years imprisonment in December 2010.

10 years ago…

Momir Talić Granted Provisional Release

On 20 September 2002, Trial Chamber II of the International Criminal Tribunal for the former Yugoslavia, comprised of Judge Agius, presiding, Judge Janu and Judge Taya, granted the Motion by the Defence of Momir Talić for provisional release.

The Trial Chamber deemed it 'appropriate' to order the provisional release of Talić in light of his medical condition. The ruling followed a confidential Motion for provisional release filed on 10 September 2002, by the Defence of Talić and a confidential response to the Motion filed by the Office of the Prosecutor on 17 September 2002.



Momir Talić

International Criminal Tribunal for Rwanda

5 years ago...

Security Council reappoints Hassan B. Jallow as ICTR Prosecutor

On 20 September 2007, the United Nations Security Council voted unanimously to reappoint Justice Hassan Bubacar Jallow as the Prosecutor of the International Criminal Tribunal for Rwanda.

The reappointment came on 14 September when the Security Council adopted Resolution 1774(2007) giving Jallow another four-year term. The appointment took effect on 15 September and was subject to early termination by the Council if the Tribunal finished its work by the end of 2010 as was projected under its Completion Strategy.

Responding to the news, Prosecutor Jallow said he felt very honoured by this decision of the Security Council. He thanked the staff of the ICTR as well as UN member states whose support he said has made much progress possible over the years. "*We must now all reinforce our resolve to successfully completing the work of the Tribunal within the framework of the Completion Strategy*" the Prosecutor stated.

Hassan Jallow

10 years ago...

First ICTR Genocide Suspect arrested in the Democratic Republic of Congo

On 30 September 2002, Colonel Tharcisse Renzaho, former prefect of Kigali-ville during the 1994 Rwandan genocide, was arrested and transferred to the Detention Facility of the ICTR in Arusha, Tanzania. He was arrested on 29 September in Kinshasa, Democratic Republic of Congo (DRC), pursuant to Rule 40bis of the Rules and Procedure and Evidence of the Tribunal.

The Registrar, Mr Adama Dieng, who was in Kinshasa, welcomed the support of the Congolese authorities in effecting the arrest, which fell within the context of reinforcing the process towards the creation of peace and stability in the region. He also praised the commitment by President Joseph Kabila to help the Tribunal identify and arrest other suspects who are still at large.

The arrest of Colonel Renzaho was the first of its kind to be carried out in the DRC and was the third arrest following the announcement of the U.S. Government's Rewards for Justice Campaign.

International Criminal Court

5 years ago…

ICC continues preparations to conduct mass outreach activities in IDP camps in the Teso region

In late September 2007, the field Outreach Team in Uganda continued preparations to conduct mass outreach activities in the internally displaced peoples (IDP) camps of the Amuria, Kaberamaido and Soroti districts where 11,700 people live. The seventy leaders from the IDP camps participated in a one day informative meeting held by the Court.

The leaders praised the Court for bringing outreach to the grassroots community for giving them an opportunity to discuss what the International Criminal Court does in Uganda and the ability to share this knowledge with the rest of their communities. An agreement was reached in order to conduct activities in the camps. Initial plans were made to hold further meetings in the Pingire, Labori Irrigation, Kabola, Kakus and Obuku camps, in December 2007.

Defence Rostrum

Is Genocide Compatible with JCE III?

By Sarah Coquillaud

The ICTY jurisprudence

Different views exist on the applicability of the third category of Joint Criminal Enterprise (JCE) to specific intent crimes. The ICTY jurisprudence proves inconsistent when it comes to that topic. To start with, regarding JCE III, the prosecution shall show two distinct intents: first, the direct perpetrator of the crime must have possessed the specific discriminatory intent, and second, the accused must have been aware that the crime was a natural and foreseeable consequence of the agreed-upon JCE. However, the Appeals Chamber in Kvočka did not distinguish between the different intents. According to the Kvočka judgment, the prosecution need not establish a discriminatory intent for each act, as long as it proves that the JCE was discriminatory and that the individual joined the JCE.

In Stakić, the prosecution sought a conviction of genocide on the basis of JCE III and noted that 'reading the modes of participation under Article 7(1) into Article 4(3), whilst maintaining the *dolus specialis* prerequisite, would lead to the same result'. The Trial Chamber acquitted Stakić of genocide under JCE III. It expressly rejected this basis of liability as being proper for genocide, stating that 'conflating the third variant of joint criminal enterprise and the crime of genocide would result in the *dolus specialis* being so watered down that it is extinguished'.

The jurisprudence became slightly confusing when the ICTY Appeals Chamber in Brđjanin disagreed with the findings in Stakić and extended liability for genocide without the special genocidal intent to joint criminal enterprise. The Prosecution appealed, arguing that the Trial Chamber 'confused the *mens rea* required for the offence of genocide with the mental state required to establish responsibility of an accused pursuant to a particular mode of liability'. The Appeals Chamber reversed the Trial Chamber decision and took the view that to hold a person responsible under JCE III, the Prosecution must prove that the perpetrator entered into an agreement with a person to commit a particular crime, and that this same person physically committed another crime, which was a natural and foreseeable consequence of the execution of the crime agreed upon. Judge Shahabudden partially dissented to that decision stating that 'genocide is a crime of specific intent, a conviction for it is therefore not possible under the third category of joint criminal enterprise' and that the prosecution still needed to prove the specific intent of the accused to commit another crime and to prove that the accused had full awareness that genocide was a foreseeable result of the other crime intended.

A month after the Brđjanin judgment, the JCE doctrine was applied to the 'ethnic cleansing' of Srebrenica in the Krstić case. The judgments in Krstić are confusing. The Trial Chamber convicted Krstić on grounds of JCE liability, holding that genocide was a natural and foreseeable consequence of a JCE to ethnically cleanse Srebrenica. But the Appeals Chamber overruled that judgment holding that awareness of others' intention to commit genocide may not be used as a substitute for the requirement of genocidal intent.

More recently, Radovan Karadžić challenged the application of JCE III to genocide in a preliminary motion to dismiss JCE III in relation to special-intent crimes. Both the Trial Chamber and the Appeals Chamber denied the motion holding that Karadžić had actually formulated substantive challenges to the JCE theory rather than addressing solely jurisdictional issues. Nevertheless, the Trial Chamber noted that it could dismiss the claim on the merits regardless, as the Chamber is bound by the Brđjanin Appeals Chamber's decision and judgment according to which convictions for genocide can be entered on the basis of the third form of JCE liability.

The incompatibility of genocide with JCE III

Joint criminal enterprise represents a broad theory of complicity. It allows the prosecution of one individual for the crime of a second individual, even if the first did not have the intention of aiding the second and even if the first is unaware of the second's existence.

The JCE doctrine is obviously tempting in genocide cases, since it is rather tricky for a prosecutor to prove the specific knowledge of every person operating within any sort of genocidal criminal organization as the phenomenon involves a multitude of persons.
The issue of applicability when convicting someone of genocide through JCE III is one of *mens rea*. The third category of JCE should not be used for specific intent crimes, as one shall not accept a conviction where a mere *dolus eventualis* is present but a *dolus specialis* is required for the crime to be charged. This could potentially lead to bypassing proof of genocidal intent.
The *mens rea* of JCE III is more than negligence but far from the special genocidal intent. Clearly, the *mens rea* for a JCE III and for genocide are not on a comparable level: genocide requires the narrowest form of specific intent to support a criminal conviction, whereas under JCE III, for an accused to incur criminal responsibility, it is not necessary to establish that he/she was aware that those acts had occurred. Rather, it is sufficient to show that the accused was aware that the acts outside the agreed enterprise were a natural and foreseeable consequence of the joint criminal enterprise and that he/she participated in that enterprise aware of the probability that other crimes may result from it.
Resorting to JCE III is a mistake when the crime committed requires a specific intent such as genocide and may not be admissible nor justifiable for a simple reason: in such a case, the co-perpetrators do not share the same intent, because if they did, the prosecution would have had to convict under JCE I or JCE II and not under the third category.

JCE is premised on the fact that not all members of the collective need to act in furtherance of the plan in the same way. Therefore, even in a case where there is a JCE, it is possible that only some of the members of the enterprise actually committed genocidal acts whereas the rest of the members did not, and therefore lacked at least the *actus reus of the crime of genocide, if not the mens rea as well.* Even if we suppose that the persons who were part of the JCE but did not commit any genocidal act nor contributed to it shared the same intent as the perpetrators, then only the *mens rea* of genocide is present, and they cannot be charged with the crime. Without the genocidal intent, JCE falls short of the standards required for a form of commission and a person would be convicted as a co-perpetrator despite the fact that he did not act with the *mens rea* provided for in the Statute.

Using any type of JCE in a genocidal context runs the risk of removing the *actus reus* from the crime. But in no case shall the *actus reus* requirement of genocide be circumvented as it would have the effect to undermine one of the most serious crimes and lead to convictions based on thoughts alone.

Genocide was never intended to be used recklessly. It is a crime that carries so much weight that it must be treated with care. Specific intent shall always be shown and proved by the Prosecution. If that *dolus specialis* is absent, there is no case for a genocide conviction.

Were the Benghazi attacks pre-planned, intentional acts of terrorism?

by Samuel Shnider

On Thursday, 20 Sep 2012, on board Air Force One en route to Miami, U.S. Press Secretary Jay Carney told reporters that the attacks on the American Embassy in Benghazi were “terrorist attacks”. Although in his words there was no clear evidence of preplanning, the ongoing investigation had tended to show links to Al-Qaeda in the Maghreb and other extremist groups in the region. The most likely interpretation was that it was an opportunistic attack by terrorist groups, seizing on the occasion of September 11th, and the furor over the video. The attackers were relatively well-armed, used assault rifles and rocket propelled grenades (RPGs) and caused the death of four American diplomats including the U.S. Ambassador to Libya, Christopher Stephens. Carney’s statement was a stronger assertion than initial statements by the White House on 14 September 2012, which suggested that the attacks were spontaneous responses to the video.

The remarks were based on assessments and conclusions made by Matthew Olsen, director of the National Counter-Terrorism Center (NCTC) on Wednesday 19 September 2012 in a Senate Homeland Security Committee hearing. Olsen noted that the ongoing investigation was still addressing intelligence about prior threats to U.S. targets in the region, and examining the possibility of pre-planning; individuals involved may have had connections to Al-Qaeda, but it was unclear if the attacks were

simply taking advantage of protests. A Republican Congresswoman, Susan Collins asserted at the hearing that she had been given clear intelligence of pre-planning. Almost immediately after the attack, President Mohamed Margariaf of Libya had also asserted that the attacks were pre-planned by foreigners from Mali and Algeria and that there was sufficient evidence to support this assertion. FBI agents have been sent to Libya to investigate these questions.

The NCTC is responsible for providing the State Department with accurate intelligence on terrorism, and the investigation has clear legal and political consequences for American action in response to the attacks. One legal consequence, suggested by a contributor to Opinio Juris, is an authorization to use force under U.S. laws enacted post-11 Sept 2001 (arguably such authority already exists under Article 51 of the U.N. Charter). From a political perspective, officially labelling the attacks as terrorism makes it easier to present them as a severe but separate and isolated event to counteract rhetoric of a global war of the U.S. against Islam, where the attacks are seen as representative of much wider demonstrations which involve entirely different, and more mainstream groups.

The NCTC complies with the definition of terrorism in Title 22, Section 2656f of the United States Code (U.S.C.), which defines terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents." This definition involves five elements: a) the attack was premeditated, b) the perpetrators were politically motivated, c) the incident involved violence, d) the targets were noncombatants, and e) the perpetrators were subnationals or non-state actors. Diplomats would appear to be clearly noncombatants, and there is no indication of any state action, as the Libyan authorities immediately decried the attacks, and launched their own investigations which have led to several arrests; but it remains unclear if the first element – premeditation – is satisfied.

The definition above is used for intelligence and reporting purposes, and is narrower than other U.S. federal definitions such as AEDPA – used to criminalize material support to designated terrorist organizations – and the Patriot Act – used for domestic investigations; nor does it match other international law definitions or the recent customary law definition by Cassese. But the element of premeditation does suggest special intent to cause fear and coerce authority, similar to Cassesse's interpretation of Lebanese law. It is thus interesting to note the distinction in Olsen's description between whether the attacks were terrorism, which he asserts that they were, and whether they were pre-planned. In Olsen's assessment, premeditation should be a lower standard than pre-planning, and these attacks reach that standard.

TMC Asser Institute Supra National Criminal Law Lecture "Lessons Learnt and Future Challenges"

By Ada Andrejević

This season's first Asser Institute lecture was given by the former ICC Deputy Prosecutor and the current Chief Prosecutor at the ICTY Serge Brammertz who spoke before a filled to capacity hall of ICTY judges, legal interns, humanitarian organization workers and graduate students whom he delighted with an unbiased and realist approach to solving the complex issues of ceasing international conflicts and their human rights abuses. With examples from his work at the ICTY, Brammertz looked to the future of how an international criminal judicial body can best respond to violence-provoking governance that threatens civilians.

Brammertz stated that international law has made "open, positive developments that we can be proud of but still face many many challenges. If we watch Syria no one would be happy with the situation there because there are no solutions for the ongoing crisis". While we have been able to find accountability post-conflict it is still hard to provide justice on the ground for ongoing conflicts. Like Syria during the Yugoslav conflict there was no possibility to react and civilians were killed everyday because of the delayed response of the international community.

Confronting such large scale conflict has proved to be challenging on the investigative and evidentiary fronts; this is due to there being no clear legal network and no rule of law to support the investigations on the ground and the threatening of witnesses who come forth to testify. Brammertz explained, as in Srebrenica massacre it took the team a year for the investigation to get off the ground, in which time the Serbs exhumed the bodies and transferred them to secret secondary graves. Such disturbance of evidence resulted in Karadžić challenging the number of bodies found because different body parts of the same person do not count as multiple people which is a valid point but a challenge for investigative teams to sort through.

Serge Brammertz

There are also problems of working with local authorities and convincing local governments to permit the access to archives and documentary evidence. Nonetheless there is the realist perspective that most crimes will not have written evidence of the human rights abuses committed. As noted above, the access to credible witnesses has been a problem because most have left the areas of conflict or feel threatened to come forth, especially in regions where conflicts are still ongoing.

Brammertz believes that the best policy which has helped the cooperation of governments of the former Yugoslavia to comply with the ICTY was the "conditionality policy" where full cooperation is rewarded with the ascension into the European Union. Such policies have been instrumental for arrests of the indicted to take place. However, once under the Tribunal's detention the largest problem, as Brammertz sees it, is case selection and choosing who will be prosecuted and the scope of the indictment making sure it is manageable during trial. Such a problem can best be observed in the Milošević trial and since then prosecutors have learnt to reduce the indictment. More recently in the Karadžić case the number of municipalities was reduced from 40 to 20 which was devastating to the victims of the non-prosecuted municipalities. Further developments have taken place at the Tribunal not to just prosecute those highest in power but to adjust in prosecuting those lower level cases which helped build a better understanding of the conflict and was easier to find insider witnesses top down. This approach, Brammertz stated, has been most successful.

There is a negative public opinion in the work which is conducted in The Hague. For example, Serbs still consider the indicted as national heroes and 60% believe the Tribunal is not necessary, while 90% do not look at judgments. Serbia's President Nikolić noted on 1 June 2012 that Srebrenica was "not genocide". In such respect Brammertz believed there is still a lot of work to be done. Perhaps, Serbs feel the court has taken a biased opinion against them because the overwhelming number of indictees are Serbs, while non-Serb crimes are rarely punished. While the media has portrayed the conflict as being Serb run, the reality is that this was a two-sided conflict from commands being given on both sides to attack the other and protect their own civilian populations.

Negative points that Brammertz noted were a lack of continuity between the 50 investigative teams in how to conduct searches and sharing information. Brammertz believed that a permanent investigative team with clear rules of procedure would resolve this badly led bureaucratic tangle. Another misfortune of the Tribunal has been not prosecuting organised crime leaders that were closely tied to the government and were financial backers of the war. Such as in the case of Arkan who was directly linked to Milošević and alleged ethnic cleansing and using the opportunity to steal everything they could find in conflict regions. The lack of prosecution of such groups has led to their continued relevance in the Balkans and within greater Europe. Some of those same groups have committed a bank robbery in Sweden recently.

In looking to the future, Brammertz explained that the ICC is the future while the ICTY remains a temporary tribunal that is set to finish its case load in the next few years. The remainder of the cases will be transferred to the region with the help of the transition team at the ICTY. Brammertz suggested that there must be a contingency budget while working with national authorities because it difficult to pick cases due to budget constraints.

In his closing remarks, Brammertz's biggest hope is that there can be another mechanism because the current system cannot deal with all conflict situations and there needs to be a proper mechanism responding during and not after the conflict has subsided. Expectations need to be high and a new mechanism within the UN as a judicial prevention with experts on the ground and best support for the problem should be implemented at the beginning of conflicts before tensions escalade.

TMC Asser Institute Supra National Criminal Law Lecture: The ICC and Palestine

By Samuel Shnider

On Wednesday, 19 September 2012, the T. M.C. Asser Institute held a lecture to celebrate the publication of Dr. Chantal Meloni's new book, *Is There a Court for Gaza?* which is now available from the Asser Press. The lecture included three speakers – Dr. Meloni, of the University of Milan; Prof. Liesbeth Zegveld, of University of Leiden, founder of the NGO Nuhanović Foundation; and Prof. John Dugard, currently Chair of Public International Law at University of Leiden, and formerly Special Rapporteur for the UNHCR on the Palestinian territories.

Dr. Meloni explained that the contribution of her book is a predominantly legal analysis of an issue that is usually overwhelmed by politics and emotions. Prof. Meloni then described the UN Human Rights Council (UNHCR) attempts to establish an accountability mechanism for the events surrounding the Gaza conflict, also known as "Operation Cast Lead". As Prof. Meloni recounted, the offensive was launched by the Israeli Defense Forces (IDF) in winter 2008-2009 in response to repeated rocket fire on civilian areas in southern Israel. The IDF offensive resulted in numerous civilian casualties and damage to civilian infrastructure in Gaza, and human rights groups were critical of Israel for allegedly showing disregard for the basic IHL principles of necessity, distinction, and proportionality. Israel countered that it was impossible to defend against terrorist groups without causing such damage, and that Hamas and other groups deliberately used school, hospitals and factories as hideouts and bases to launch attacks.

Prof. Meloni described how in January 2009, the UNHCR passed resolution S-9/1, to send an international fact-finding mission; Justice Richard Golstone was chosen to lead the mission. The original mandate of the mission was only to investigate Israeli violations, but Prof. Goldstone refused to accept the position unless the mandate was enlarged to investigate Hamas as well. The mission found that crimes had been committed, and recommended that both sides open credible investigations into their actions. In September 2010 the UNHRC found that neither side had conducted such investigations, and in March 2011, the Council recommended referral to the ICC. (The Palestinian Authority had already attempted to accept jurisdiction of the ICC in 2009, and an investigation was begun.) On 3 Apr 2012, the Prosecutor issued a two-page decision that the matter was not for the Prosecutor to pursue, since it depended on the political recognition of Palestine as a state.

Prof. Chantal Meloni

Prof. Meloni then described criticisms of the Prosecutor's decision: Amnesty International criticized the decision for officially linking the jurisdiction of the ICC to the political process, and for confining certain actors outside the jurisdiction of the Court; others remarked on the prosecutor's decision not to submit the matter for judicial decision; and others complained that even if the decision was correct, the Prosecutor should not have removed the matter entirely from the docket. Prof. Meloni also spent a fair amount of time explaining why Goldstone's recantation of the report did not change the weight of the mission's findings.

Professor Zegveld spoke about an international criminal law perspective on the findings of the Goldstone mission and its Report, which was criticized by Israel and others for perverting the truth. She noted that fact-finding commissions were charged with finding evi-

Prof. John Dugard

dence of violations of IHL, and Human Rights law, not establishing crimes – which require intent by a known perpetrator. The commission dealt only with victims, and its mandate was not to find the individuals responsible or to reach the standard of proof in criminal trials. In particular in light of Israel's decision not to cooperate with the commission, the Report contains little information that would tend to establish mens rea or criminal responsibility.

Lastly, Professor Dugard spoke from the perspective of a man who had actually worked closely with Goldstone, and been a special Rapporteur to the region. Prof. Dugard had sharp criticism for the prosecutor, and noted that the decision had been embargoed for three years until its final release, and that it was ultimately "dishonest" in ignoring reasons to consider Palestine as a state. The decision's most severe result, in Prof. Dugard's opinion, was that it undermined the notion of fact-finding missions in general. Prof. Dugard noted that fact-finding commissions do not have the power to subpoena witnesses, cross examine, or to compel parties to participate; but nonetheless it is their task to conduct "as thorough an investigation as possible" and they are therefore "as good as a court of law". In Prof. Dugard's opinion, there was circumstantial evidence of intent in the widespread nature of the IDF attack on civilian facilities; this, in his words, established criminal responsibility "beyond a reasonable doubt". Prof. Dugard concluded that in his opinion the report established that Israel had committed war crimes, and crimes against humanity, while Hamas had committed war crimes.

In the questions and answers session, one of the more vocal students suggested Prof. Dugard be nominated for the Peace Prize. Another student questioned the notion that Israel had not conducted its own investigations, and cited the Mavi Marmara Report. Prof. Dugard responded to the issue by noting that the flotilla incident was significant in that it technically occurred on board a Comoros-flagged ship, and thereby was subject to the territorial jurisdiction of the Court. He also agreed that the Israeli decision not to cooperate with the Goldstone commission was based on the anti-Israel bias of the UNHCR. This bias certainly was present, Prof. Dugard agreed, and the UNHCR does tend to preoccupy itself disproportionately with Israel; but Prof. Dugard explained that states have a tendency to use the UNHCR to bring grievances against Israel, to balance the perceived unfair Security Council bias in favor of Israel because of the U.S. veto. Thus, he said, "we have two UN bodies...and they are both [equally] biased".

BLOG UPDATES

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- William Schabas, **More Mystery about the Charles Taylor Judgement (and its Appeal),** 14 September 2012, available at: http://humanrightsdoctorate.blogspot.nl/2012/09/more-mystery-about-charles-taylor.html
- Kirsty Sutherland, **ECHR Rules that Human Rights Trump UN Security Council Resolutions,** 14 September 2012, available at: http://www.internationallawbureau.com/blog/?p=6013
- Sandra Babcock, **Nevada's high court follows ICJ consul rights ruling,** 26 September 2012, available at: http://www.intlawgrrls.com/2012/09/nevadas-high-court-follows-icj-consul.html
- Julien Maton, **Guantanamo's Perversion of Justice,** 9 September 2012, available at: http://ilawyerblog.com/guantanamos-perversion-of-justice/
- Kevin Jon Heller, **How Many Times Has Netanyahu Fear-Mongered About Nukes?,** 27 September 2012, available at: http://opiniojuris.org/2012/09/27/how-many-times-has-netanyahu-fear-mongered-about-nukes/
- Polina Levina and Kaveri Vaid , **The Recent HRW Torture In Afghanistan Report: What Does It Mean For The ICC?,** 27 September 2012, available at: http://opiniojuris.org/2012/09/27/levina-and-vaid-guest-post-on-the-recent-hrw-torture-in-afghanistan-report-what-does-it-mean-for-the-icc/
- Kirsty Sutherland, **ECtHR Rules UK Indefinite Detention Provisions Could Lead to Arbitrary Detention,** 18 September 2012, available at: http://www.internationallawbureau.com/blog/?p=6089

PUBLICATIONS AND ARTICLES

Books

William A. Schabas and Nadia Bernaz (Eds) (2012), *Routledge Handbook on International Criminal Law,* Routledge

George P. Fletcher and Jens David Ohlin, *Defending Humanity: When Force is Justified and Why* (2012), Oxford University Press

Helmut Satzger, *International and European Criminal Law* (2012), Beck/Hart Publishing

Angela del Vecchio, *International Tribunals between Globalisation and Localism* (2012), eleven International Publishing

Chile Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts* (2012), Martinus Nijhoff

Bartram S. Brown (ed) (2012), *Research Handbook on International Criminal Law, Edward Elgar Publishing*

Articles

Douglas Guilfoyle (2012), "Prosecuting Somali Pirates: A Critical Evaluation of the Opinions", *Journal of International Criminal Justice,* 10(4), pp. 767-796

Larry D. Johnson (2012) "The Lubanga Case and Cooperation between the UN and the ICC: Disclosure Obligation v. Confidentiality Obligation", *Journal of International Criminal Justice,* 10(4), pp. 887-903

Jens David Ohlin (2012) "Second-Order Linking Principles: combining Vertical and Horizontal Modes of Liability", *Leiden Journal of International Law,* 25(3), pp. 771-797

Inger Osterdahl, (2012) "Just War, Just Peace and the Jus post Bellum", *Nordic Journal of International Law,* 81(3), pp. 271 -293

Russell Buchan, "Cyber Attacks: Unlawful Uses of Force or Prohibited Interventions?", *Journal of Conflict and Security Law,* 17(2), pp. 212-227

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EVENTS

9th Annual Conference—From Peace to Justice 2012

Date: 12-13 October 2012

Venue: International Institute of Social Studies (ISS), Kortenaerkade 12, The Hague

More info: http://www.asser.nl/events.aspx?id=314

Revolution in the Air

Date: 2 November 2012

Venue: 9 Bedford Row, London

More info: http://www.9bedfordrow.co.uk/92/?form_87.replyids=44

International Humanitarian Assistance and International Law: A Legal Approach to Practical Problems

Date: 24-25 January 2013

Venue: Leiden University

More info: http://law.leiden.edu/research/news/conference-intern-humanitarian-assistance.html

OPPORTUNITIES

Senior Prosecuting Trial Attorney (P5), The Hague - Netherlands

International Criminal Tribunal for the Former Yugoslavia (ICTY)

Closing date: 4 October 2012

Assistant/Associate Case Manager (P1/P2), The Hague - Netherlands

Special Tribunal for Lebanon (STL)

Closing date: 12 October 2012

Translator/Reviser (French) (P-4), The Hague

International Criminal Tribunal for the Former Yugoslavia

Closing date: 14 October 2012