ADC NEWSLETTER
ISSUE 70
4 July 2014

Head of Office: Isabel Düsterhöft
Assistants: Vesselina Vassileva and Benjamin Schaefer
Contributors: Isaac Amon, Douglas Chalke, Simeon Dukić, Adam Harnischfeger, Molly Martin, Garrett Mulrain, Philipp Müller, Yoanna Rozeva, Paul Stokes and Camille Sullivan
Design: Sabrina Sharma

ICTY CASES

Cases at Trial

Hadžić (IT-04-75)

Karadžić (IT-95-5/18-I)

Mladić (IT-09-92)

Šešelj (IT-03-67)

Cases on Appeal

Popović *et al.* (IT-05-88)

Prlić *et al.* (IT-04-74)

Stanišić & Simatović (IT-03-69)

Stanišić & Župljanin (IT-08-91)

Tolimir (IT-05-88/2)

Prosecutor v. Šešelj (IT-03-67)

On 6 June, the Appeals Chamber rendered its *Decision on Appeal against Decision on Continuation of Proceedings* in the case of *Prosecutor v. Šešelj*. It upheld the Trial Chamber's decision from 13 December 2013, in which it had ordered the continuation of the proceedings against Šešelj from the close of the hearings as soon as Judge Niang finished familiarising himself with the record of the case. Judge Niang had been assigned to Trial Chamber III on 31 October 2013 following the disqualification of Judge Harhoff from the Chamber for apprehension of bias. Šešelj had appealed the Trial Chamber's decision, arguing that the replacement of Judge Harhoff with Judge Niang had, *inter alia*, violated the principles of immediacy and adversarial process with participation by the judges because Judge Niang had not been present during the trial proceedings. Furthermore, Šešelj had asserted that Judge Harhoff's participation in the trial and the decisions rendered by the Chamber to date had rendered the proceedings invalid, and that it would be unfair if he had to remain in detention while Judge Niang familiarised himself with the record, which would be likely to take a long time if performed with the necessary diligence.

The Appeals Chamber held that, in principle, nothing prevented the Trial Chamber from exercising its discretionary power to determine whether it would serve the interests of justice in the case before it was to continue the proceedings with a substitute judge. Accordingly, it would overturn the impugned decision only if the Trial Chamber had committed a discernible error in the exercise of its discretion. In its view, Šešelj had failed to show that the Trial Chamber had committed such an error in its evaluation of whether continuation of the proceedings would serve the interests of justice. Furthermore, the Chamber had not erred in concluding

ICTY NEWS

Also in this issue

that there was nothing to indicate that Judge Harhoff's involvement in the trial to date had violated Šešel's right to a fair trial, and that his right to be tried without undue delay had not been violated. Consequently, the Appeals Chamber denied Šešelj's appeal and upheld the impugned decision.

Judge Koffi Kumelio A. Afanđe appended a dissenting opinion to the Appeals Chamber's decision, arguing that the Trial Chamber had indeed committed an error of law by rendering its decision under Rule 54 of the Tribunal's RPE; instead, it should have considered the stricter protection regime provided by Rule 15. Similarly, he stated that the majority was incorrect in interpreting the safeguards offered by Rule 15 in the light of Rule 15 *bis*. In his view, the two rules were mutually exclusive rather than comparable to complement one another. He emphasised that it was not possible to equate a situation where a judge becomes unavailable for reasons envisaged in Rule 15 *bis*, such as health reasons, with one where a judge is disqualified from the bench for apprehension of bias.

Moreover, even though Rule 15 did not expressly state how to proceed with a trial after the disqualification of a judge, there was no precedent in international or domestic law where after a disqualification of a judge, particularly at such a late stage of the trial, the proceedings continued as if nothing had happened. Instead, it would have followed the case law of the Tribunals and the European Court of Human Rights to suppose that Judge Harhoff's mere presence on the bench had tainted the fairness of the proceedings, rather than requiring of Šešelj to point to particular decisions which were allegedly influenced by Judge Harhoff.

Afanđe closed his dissent by arguing that although the continuation of the trial pursuant to Rule 15, as well as a retrial by a newly constituted Trial Chamber, would be legally possible, this would risk abuse of process and endanger the fundamental rights of the Accused. It could also harm the integrity of the Tribunal, to the extent that in spite of the serious charges against the Accused, he would have quashed the impugned decision, dismissed the indictment against Šešelj and ordered his immediate release.

On 13 June, Trial Chamber III issued an order in which it envisaged the possibility of granting *proprio motu* provisional release to Šešelj, and invited the parties to make submissions on the matter. The Chamber considered that Judge Niang had indicated that he will need additional time to familiarise himself with the record of the case and that therefore the proceedings will be prolonged without the possibility to determine exactly when the judgement will be pronounced. Taking into account the extensive amount of time Šešelj has already spent in detention, as well as current health concerns, the Chamber thus deemed it appropriate to obtain the parties' views on the possibility of granting provisional release.

Vojislav Šešelj

Prosecutor v. Mladić (IT-09-92)

On 10 June, the Defence began examination of witness Svetozar Guzina, former commander of the Army of Republika Srpska (VRS) battalion stationed in Nedžarići. Guzina testified that while in command, he was under strict orders not to shoot civilians and was not aware of a single incident where civilians were targeted. The Defence tendered as evidence an order from the VRS Main Staff commanding Guzina not to prevent humanitarian convoys from passing through and to adhere to the Geneva Conventions. The witness insisted that this order was strictly followed. However, when pressed by Judge Orie, Guzina's knowledge of the Geneva Conventions was incomplete. On cross-examination, Guzina echoed the testimony of prior Defence witnesses, saying that the Muslim side was the first to arm themselves in the conflict. Contrary to the witness's testimony that his unit committed no crimes against Sarajevo citizens, the Prosecution introduced evidence allegedly showing that Guzina's unit expelled non-Serbs from Do-

brinja. The witness, however, insisted that those who left did so safely and voluntarily. In response to evidence that his unit destroyed the village of Azići, Guzina insisted it was only shelled because his unit knew there were no civilians present. The Prosecution concluded by asking the witness about his use of the word 'poturice' during the war as a derogatory term for those who converted to Islam. Guzina denied that he used the word 'derogatorily' and, on re-direct examination, the Defence sought to demonstrate that the word has historically been used in a non-derogatory fashion.

The next witness to testify was Milorad Batinić, former solider of the VRS Ilidža Brigade. Batinić described how Serb civilians in "the occupied Sarajevo" were exposed to sniper and mortar fire from the BiH Army and how his close relatives were killed in the city. The witness also spoke about the alleged shelling of Markale by Serb soldiers, which previous witnesses have argued was staged by the Muslim side. The Defence showed footage of the incident as Batinić noted abnormalities that he argued demonstrate that the incident was staged. In response to allegations that Mladić's troops held United Nations staff hostage, the witness said that he was with the staff and that they were not hostages; they were free to leave at any time. In cross-examination, the Prosecution challenged Batinić's assertions regarding Markale, saying that the witness has no first-hand knowledge of the incident. Batinić conceded he had not done investigations, but relied on things he heard from the former Commander of the Igman Brigade and the Chief of the Sarajevo-Romanija Corps (SRK) intelligence and security. When the Prosecution confronted Batinić with evidence that the Serb side consistently shelled Sarajevo, the witness denied having sufficient knowledge of it.

From 16 to 20 June the trial was adjourned because the Accused was receiving treatment for a stomach flu. Mladić did not give permission for the trial to continue in his absence.

After Court resumed on 23 June, former Company Commander of the 2nd Battalion of the Sarajevo Motorised Brigade, Miloš Škrba testified for the Defence on the Markale incident. Škrba explained that his company, which secured the Lukavica-Pale road, did not have any heavy artillery, in particular 120mm mortars, and therefore it was not possible for the shell that landed at the Markale Market in Sarajevo on 28 August 1995 to have been fired from this position. Further, Škrba asserted that there was no sniper unit and no sniper weapons at Baba Stijena as there was no direct line of vision to the positions of the Army of Bosnia and Herzegovina (ABiH). On cross-examination the Prosecution presented evidence to the witness that four 120mm mortars were positioned in Trebević-Palez, however, Škrba maintained that there must have been a typo in the document as he was only aware of 82mm mortars located in this area. These artillery weapons were not in the control of his company but were called in by the Battalion Command when they were attacked by the ABiH forces.

Škrba also testified that at no point throughout the war did he receive or issue either oral or written orders to open fire on civilian targets. However, on cross-examination Škrba clarified that fire was targeted in defensive actions at civilian facilities in the combat zone that were inhabited by the ABiH soldiers, but at this stage there were no civilians remaining in the area. Further, Škrba testified in Mladić's defence that humanitarian convoys that passed through the eastern part of Sarajevo were always allowed to enter into the territory of the VRS despite evidence from the Prosecution of a communication referring to the VRS-imposed restriction of movement.

Stevan Veljoić was Assistant Chief of Staff for Operations and Training in the 1st Romanija Brigade, and then in the Sarajevo-Romanija Corps (SRK). In direct -examination Veljoić testified that there were no 120mm mortars in the Trebević area at the time of the Markale II incident in August 1995. However, on cross-examination Veljoić stated that when the Trebević Battalion joined the 1st Romanija Brigade two 120mm mortars were added to its artillery.

He also explained in his testimony that his unit used intelligence and direct observation to establish that the ABiH units were positioned in the Kosevo Hospital and had a tank in the Sarajevo area. The Prosecution questioned Veljoić extensively on the function of the operations centre at the 1st Romanija Brigade and communication between the Chief of Staff and Brigade Commander. Veljoić confirmed his previous testimony from the Milosević and Karadžić cases that modified air bombs were a "completely inaccurate

and highly destructive weapon". As a result,VRS units were only allowed to use these weapons after approval by the Commander of the SRK and in wide open areas not urban locations. His testimony continued on 2 July.

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

A Status Conference was held on 24 June in the case *Prosecutor v. Tolimir* by the Pre-Appeal Judge, Theodore Meron. The conference was very brief, with neither Tolimir nor the Prosecution raising any issues or concerns for the Judge. As there are no pending issues or motions before the Appeals Chamber in this case, the parties are now waiting for announcement of the appeals hearing, which was not addressed in the conference. Tolimir was convicted by Trial Chamber II in December 2012 and filed his Consolidated Appeal Brief on 28 February 2014.

LOOKING BACK...

Extraordinary Chambers in the Courts of Cambodia

Five years ago…

On 26 June 2009, the Pre-Trial Chamber of the ECCC dismissed the appeal against an *Order extending the Provisional Detention of Ieng Sary*. Sary was initially placed in Provisional Detention on 14 November 2007 for the allocated one year period pursuant to Internal Rule 63 on charges of crimes against humanity, genocide and grave breaches of the Geneva Conventions of 1949. Sary served as Deputy Prime Minister for Foreign Affairs in the Khmer Rouge regime between 1975 and 1979 and concurrently as a member of the Central and Standing Committees of the Communist Party of Kampuchea.

The Co-Lawyers for Sary, including Michael G. Karnavas, filed their appeal challenging the extension of Provisional Detention on 10 December 2008, alleging that the Co-Investigating Judges did not conduct their investigation with due diligence and failed to respect the fundamental rights of the Accused. They submitted that the Co-Investigating Judges failed to identify new evidence against the Accused to establish a well-founded reason to believe the Accused may have committed the crimes alleged, and this does not satisfy the higher level of evidence required by Internal Rule 63(3)(a).


Ieng Sary

The Pre-Trial Chamber rejected this argument, explaining that once "well founded reasons" have been established and there is no exculpatory evidence found to undermine these then this is sufficient to satisfy the Rule. In dismissing the appeal the Trial Chamber also found that the Co-Investigating Judges had adequately established sufficient grounds that render Provisional Detention necessary to protect the security of the Accused, preserve public order and ameliorate the risk of flight.

The provisional detention of Sary was extended to 12 November 2009, however, the proceedings against Sary were terminated without a judgment following the death of the Accused on 14 March 2013.

International Criminal Tribunal for Rwanda

Ten years ago…

On 17 June 2004, Trial Chamber III of the ICTR found Sylvestre Gacumbitsi guilty of genocide, extermination and rape as crimes against humanity, and sentenced him to thirty years imprisonment. However, in their unanimous decision the Trial Chamber rejected the alternate charge of complicity in genocide and acquitted Gacumbitsi of the charge of murder as a crime against humanity due to a lack of proof.

Sylverstre Gacumbitsi

Gacumbitsi was Mayor of the Rusomo Commune in Kibungo Prefecture up until April 1994 and subsequently a member of the Mouvement Républicain National Pour le Développement et la Démocratie (MRND). The Trial Chamber found Gacumbitsi clearly manifested genocidal intent against an ethnic group under Article 2(2) of the ICTR Statute in relation to the killings of Tutsi civilians in the commune at Rusomo, citing Gacumbitsi's involvement arranging meetings with military officials between 7 and 14 April 1994 to plan the crimes, distribute weapons and incite hatred amongst the population against the Tutsis. Further, Gacumbitsi was personally involved in the killing of Tutsi civilians taking refuge at Nyarubuye Church on 15, 16 and 17 April 1994, where he ordered the communal police over which he had legal authority to participate in the attack. The Court found the selection of the Tutsi victims and the perpetration of the attacks at the Commune of Rusomo satisfied the requisite element of discrimination against an ethnic group in order to find Gacumbitsi guilty of genocide. The sheer scale of the massacre given the high numerical strength of the victims at Nyarubuye parish amounted to extermination as a crime against humanity under Article 3(b) of the Statute. Gacumbitsi had individual criminal responsibility under Article 6 (1) for planning and instigating the widespread and systematic attacks against the Tutsis.

In their decision on 2 October 2003, the Trial Chamber dismissed a Defence Motion for partial acquittal of the Accused but determined that an allegation of rape that was introduced late in the trial should be excluded as it was not in the original indictment. Nonetheless, Gacumbitsi was found guilty of rape as a crime against humanity on the basis of evidence that he publicly incited the rape of Tutsi women.

The trial commenced on 28 July 2003 and closing arguments were presented by both the Defence and the Prosecution on 1 March 2004. After appeals were filed by both - the Defence and the Prosecution, the Appeals Chamber upheld the Trial Chamber's previous convictions on 7 July 2006, finding Gacumbitisi also guilty of murder as a crime against humanity and increasing his sentence to life imprisonment.

International Criminal Tribunal for the Former Yugoslavia

Fifteen years ago…

On 25 June 1999, Trial Chamber I of the ICTY handed down its written judgement in the case against Zlatko Aleksovski, former Commander of the prison facility at Kaonik, near Busovača in Bosnia and Herzegovina. Aleksovski was indicted on 10 November 1995 on two counts of grave breaches of the Geneva Conventions for inhuman treatment and wilfully causing great suffering or serious injury to body or health under Article 2 of the ICTY Statute and one count of outrages upon personal dignity as a violation of the laws or customs of war under Article 3.

With regard to Article 3 of the Statute, the Trial Chamber found Aleksovski both individually responsible under Article 7(1), and guilty of superior

ICTY Statute

Article 7

Individual Criminal Responsibility

1) 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.

2) The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

criminal responsibility, Article 7(3), as Commander of the prison with direct authority and control over the behaviour and conduct of prison guards. In its decision the Trial Chamber accepted evidence that Aleksovski ordered, and/or aided and abetted the physical and psychological mistreatment of Muslim prisoners inside the prison, and used detainees as human shields and for trench digging. These offences amounted to outrages upon personal dignity.

However, the Trial Chamber was unable to agree on the application of Article 2 of the Statute to the indictment. In their majority decision, Judge Lal Chand Vohrah and Judge Rafael Nieto-Navia found that the Muslim prisoners were not "protected persons" during their detention at Kaonik prison between January 1993 and May 1993, and that the alleged crimes occurred during an international armed conflict. They, therefore, rendered Article 2 inapplicable and acquitted Aleksovski of the corresponding charges. Judge Rodrigues issued a dissenting opinion in which he was satisfied of the evidence that an international armed conflict existed during the relevant period, notwithstanding that in his opinion the international character was not a requisite element of Article 2.

Aleksovski was sentenced to two and half years imprisonment, with the Court ordering his immediate release after crediting time spent in detention in Croatia and at the Tribunal. On 2 February 2000, the Appeals Chamber increased the sentence to seven years imprisonment, finding the Trial Chamber erred by not having sufficient regard to the gravity of the offences.

NEWS FROM THE REGION

Bosnia and Herzegovina

Tuzla Shelling Jail Term Reduced by Bosnian Court

The Bosnian Court has reduced the jail term for Novak Djukić from 25 to 20 years, who was convicted for the shelling of Tuzla in 1995, which resulted in 71 deaths. In the previous decision of the Court in 2010, Djukić, who was the Commander of the Bosnian Serb Army's Ozren Tactical group, was found guilty of ordering an artillery squad to shell Tuzla on 25 May 1995.

Djukić's sentence was based on the Bosnian Criminal Code, however, at the time that the crime was committed the Bosnian Criminal Code was not yet in force. As Djukić should have been tried according to the more lenient Criminal Code of Yugoslavia, the Bosnian Court overturned his previous sentence of 25 years. There have been 16 war crimes verdicts that have been overturned for the same reason.

Last year, Members of Parliament and victim groups in Republika Srpska called on the Parliament to provide financial assistance to overturn Djukić's sentence because they argued that the Court did not prove that he was guilty.

Iraqi Fighter Faces Bosnia War Crimes Retrial

Abdulahim Maktouf, an Iraqi who fought alongside the Bosnian Army during the 1992-1995 conflict will be facing a retrial since his original sentence of five years was annulled. Maktouf was originally convicted for war crimes against civilians in the Travnik area in 1993.

According to the Verdict from 2006, Maktouf aided members of the "El Mudzahid" squad. This group was a detachment of the Third Corps of the Bosnian Army, which specifically enlisted foreign "Mujahideen" volunteers. Abdulahim Maktouf originally received his sentence as a result of taking two Croat civilians as hostages.

The verdict was annulled because the Court at the time relied on the 2003 Bosnian Criminal Code, as opposed to the Criminal Code of the Former Yugoslavia, which was in force at the time that the crimes were committed and therefore has ultimate jurisdiction. The Presiding Judge, Minka Kreho, instructed the retrial court that only evidence regarding the length of the sentence will be presented and that this case will not focus on the guilt or innocence of the Accused. The retrial of Maktouf is one of the two dozen completed war crimes cases that have been annulled, since the wrong criminal code was used.

Montenegro

Montenegro Cited for "Lack of Accountability" in Human Rights Violations

The Council of Europe's Commissioner for Human Rights, Nils Muiznieks, has called upon Montenegro to "end impunity for wartime crimes" in a report following his visit to the country earlier this year. Citing a lack of high profile indictments, the Commissioner expressed concern that the "lack of accountability" for serious violations of international human rights threatens to derail Montenegro's efforts at coming to terms with its violent past and promoting inter-ethnic dialogue.

Despite the fact that Montenegrin war crimes are "considered to be among the best-documented and evidenced" in the Balkans, indictments have been limited largely to actors operating at the lowest levels of the Montenegrin military hierarchy with the indictees' superiors continuing to remain above suspicion. While Muiznieks concedes that each state must bear its own responsibility for prosecuting wartime crimes, he warns that reconciliation cannot be achieved in a criminal justice system which fails to bring perpetrators of serious violations of international human rights to justice.

"Justice is not only retributive", wrote Muiznieks, "It is also, or above all, preventive, aiming to ensure that all people in the region come to terms with the past and live in peace in a cohesive, pluralist democratic society". To this end, Muiznieks called upon Montenegro to ensure perpetrators were subject to "effective investigations, prosecutions and fair trials" and tried, prosecuted and sanctioned in line with international and European standards lest a culture of impunity sap the public's trust in the rule of law.

Of the few wartime criminal cases brought to trial, rulings have frequently been at odds with international humanitarian law and have failed to reflect the jurisprudence of the ICTY. In the Deportation case of May 2013, the Appellate Court in Podgorica came under intense scrutiny for failing to characterise the war in Bosnia and Herzegovina as an armed international conflict, thereby allowing the Court to conclude that the civilians' deportations and subsequent murders did not constitute breaches of international humanitarian law. Montenegro has also come under criticism from human rights organisations for the excessive length of criminal proceedings as well as the leniency of the sentences imposed on the few Defendants convicted of war crimes.

This is not the first time Montenegro has come under censure for failing to fully investigate allegations into wartime atrocities. In its annual progress report on Montenegro in October 2013, the European Commission found that "the charges of command responsibility, co-perpetration or aiding and abetting have so far not been used".

NEWS FROM OTHER INTERNATIONAL COURTS

International Criminal Court

By Xia Ying, Intern, Office of the Public Counsel for the Defence

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

THE PROSECUTOR v. BOSCO NTAGANDA

Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statue on the Charges of the Prosecutor Against Bosco Ntaganda

On 9 June, Pre-Trial Chamber II of the International Criminal Court confirmed charges consisting in 18 counts of war crimes (murder and attempted murder, attacking civilians, rape, sexual slavery, pillaging, forcible transfer of population and displacement of civilians, attacking protected objects, destroying the enemy's property, and rape, sexual slavery, enlistment and conscription of child soldiers under the age of fifteen years and using them to participate actively in hostilities) and crimes against humanity (murder and attempted murder, rape, sexual slavery, persecution, forcible transfer of population and displacement of civilians) against Bosco Ntaganda and committed him for trial before a Trial Chamber on the charges as confirmed.

Based on the evidence submitted to its consideration, the Chamber found that there was a widespread and systematic attack against the civilian population pursuant to an organisational policy adopted by the Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo (UPC/FPLC) to attack civilians perceived to be non-Hema, such as those belonging to Lendu, Bira and Nande ethnic groups. First of all, based on the evidence, the Chamber confirmed that the UPC/FPLC was an organisation and noted that it adopted an organisational policy to attack the non-Hema civilian population. Pursuant to the organisational policy, an attack took place between on or about 6 August 2002 and on or about 27 May 2003, in Ituri Province, Democratic Republic of the Congo (DRC). According to the Pre-Trial Chamber, this attack is specifically demonstrated by a series of assaults. These assaults, viewed as a whole, form a course of conduct involving the multiple commissions of acts referred to in Article 7(1) of the Rome Statute and, consequently, constitute an attack within the meaning of that provision. Furthermore, the Chamber found that the attack against the civilian population was widespread, as it resulted in a large number of civilian victims in a broad geographical area over the period between on or about 6 August 2002 and on or about 27 May 2003. The Chamber also found that the attack was systematic, following a regular pattern. Locations with a predominantly non-Hema population were targeted. Moreover, in its operations, the UPC/FPLC followed a recurrent *modus operandi*, including the erection of roadblocks, the laying of land mines and coordinated the commission of the unlawful acts. In addition, the Chamber found that a non-international armed conflict between the UPC/FPLC and other organised armed groups took place between on or about 6 August 2002 and on or about 31 December 2003 in Ituri Province, DRC.

The Chamber found that, as part of the widespread and systematic attack against the non-Hema civilian population and in the context of the non-international armed conflict, the crimes with which Bosco Ntaganda is charged were committed during two specific attacks, in addition to war crimes committed by the UPC/FPLC throughout the conflict. These specific attacks were carried out in identified locations in Banyali-Kilo *collectivité* between on or about 20 November and on or about 6 December 2002 (the “First Attack”) and in identified locations in Walendu-Djatsi *collectivité* between on or about 12 and on or about 27 February 2003 (the “Second At-

tack").

Finally, the Chamber found that Bosco Ntaganda bears individual criminal responsibility pursuant to different modes of liability, namely: direct perpetration, indirect co-perpetration (Article 25(3)(a) of the Statute); ordering, inducing (Article 25(3)(b) of the Statute); contribution to the commission or attempted commission of crimes by a group of persons acting with a common purpose in any other way (Article 25 (3)(d) of the Statute); or as a military commander for crimes committed by his subordinates (Article 28(a) of the Statute).

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

THE PROSECUTOR v. LAURENT GBAGBO

Decision on the Confirmation of Charges against Laurent Gbagbo

On 12 June, Pre-Trial Chamber I of the International Criminal Courtconfirmed by majority four charges of crimes against humanity (murder, rape, other inhumane acts or – in the alternative – attempted murder, and persecution) against Laurent Gbagbo and committed him for trial before a Trial Chamber.

The Chamber found that there is sufficient evidence to establish substantial grounds to believe that Laurent Gbagbo is criminally responsible for the above crimes in Abidjan, Côte d'Ivoire, committed between 16 and 19 December 2010 during and after a pro-Ouattara march on the Radiodiffusion Television Ivoirienne (RTI) headquarters, on 3 March 2011 at a women's demonstration in Abobo, on 17 March 2011 by shelling a densely populated area in Abobo and on or around 12 April 2011 in Yopougon.

The Chamber recalled that, in accordance with the Statute, crimes against humanity require a widespread or systematic attack against the civilian population. Therefore, the Chamber needed to establish, first, the existence of an attack directed against the civilian population and, second, the widespread or systematic character of the attack. According to article 7(2)(a) of Rome Statute, the definition of "attack" requires a course of conduct involving the commission of multiple acts pursuant to or in furtherance of a State or organisational policy. By separately explaining "course of conduct", "policy" and "organisation", the Chamber concluded that there are substantial grounds to believe that the attack, as defined above, was carried out pursuant to or in furtherance of a State or organisational policy to commit such an attack. As to the widespread and systematic character of the attack, the term "widespread" connotes the large-scale nature of the outbreak and the number of targeted persons, while the "systematic" requirement has been consistently understood to be the organised nature of the acts of violence and the improbability of their random occurrence. Based on the analysis of the evidence, the Chamber concluded that the attack had been "widespread" and "systematic" within the meaning of article 7(1) of the Rome Statute.

Finally, the Chamber found that Gbagbo bears individual criminal responsibility for committing these crimes, jointly with members of his inner circle and through members of the pro-Gbagbo forces (Article 25(3)(a) of the Rome Statute) or, in the alternative, under Article 25(3)(b) or, in the alternative, for contributing in any other way to the commission of these crimes under Article 25(3)(d).

Judge Christine Van den Wyngaert delivered a dissenting opinion, in which she expressed her view on the insufficient evidence to confirm the charges against Laurent Gbagbo on the basis of Article 25(3) (a), (b) and (d). She argued that the evidence for the charges under these modes of liability falls below the threshold of Article 61(7) of the Rome Statute. With regard to the charges under Article 25(3)(a), Judge Van den Wyngaert was unable to consider Laurent Gbagbo as an indirect perpetrator because the available evidence cannot provide substantial grounds to believe that the alleged common plan to maintain Laurent Gbagbo in power involved the commission of crimes against civilian pro-Ouattara supporters. In addition, she argued that the available evidence failed to show that Laurent Gbagbo, either alone or in concert with one or more members of the alleged "inner

circle", used the forces at his disposal to intentionally commit crimes against civilians. Furthermore, with respect to the charges under Article 25(3)(b), she held that there is not enough evidence to conclude that Laurent Gbagbo would have ordered or otherwise deliberately prompted the commission of any of the crimes against civilians. Finally, as to the charges under Article 25(3)(d), she stated that the available evidence is still insufficient to confirm the existence of a group acting with a common purpose.

Special Tribunal for Lebanon

STL Public Information and Communications Section

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

Prosecutor's Opening Statement

On 18 June, he Trial Chamber Presiding Judge, Judge David Re, opened the hearing by indicating that the *Ayyash et al.* trial against the five Accused has resumed. The trial had started on 16 January this year, but was postponed upon the Defence's request. Since then, the Trial Chamber heard from 15 witnesses and the written statements of another 48 were admitted into evidence. Judge Re reminded the public that the case against Hassan Habib Merhi was joined to the case against Ayyash, Badreddine, Oneissi and Sabra on 11 February 2014.

Judge David Re

Two Senior Prosecution Counsel presented the Prosecutor's opening statement. Details of the attack and its aftermath were described in detail, and an overview of the human and material losses incurred were provided. Counsel also spoke about the role of the five Accused before focusing on the alleged role that Merhi is believed to have played in the conspiracy to assassinate the former Lebanese Prime Minister, Hariri. Additionally, Counsel provided an overview of the various phone networks alleged to have been involved in the conspiracy.

Counsel for Merhi's Opening Statement

On 19 June, Lead Counsel for Merhi, Mohamed Aouini, presented the Merhi Defence's opening statement. The Defence started by expressing its deepest sympathy to the "victims of the atrocious and horrific attack" on 14 February 2005.

Mohamed Aouini

In the opening statement, Counsel for Merhi focused on the inability of the Merhi Defence to develop a detailed line of defence while the trial is resuming in a staggered manner. He also argued that the Prosecution's case can only be understood as a whole and that the alleged acts in the indictment are inter-related. Moreover, Counsel emphasised the inequality of arms between the Prosecution and Defence and spoke about difficulties related to the use of circumstantial evidence in the case. Aouini focused on the defence rights and the presumption of innocence principle and said, "Defence will endeavour to protect the interests of the Accused on the basis of a possible later appearance of the Accused". Counsel stressed the fact that the Prosecution did not put forward any motive for the crime, which the Defence will explore.

Prosecution Witness Testimonies

On 24 June, June two Prosecution witnesses testified via videolink – witness PRH450 who testified under protective measures, and Shadi Saadeddine, PRH499.

After reading to the record the summaries of the statements of four Prosecution witnesses on 19 June, the Prosecution also presented four remaining witness statements during the hearing of 26 June.

Hearings resumed on Tuesday 1 July at 10 AM CET. All planned hearings can be found on the STL's court calendar at: http://tinyurl.com/ksg4lm3

Extraordinary Chambers in the Courts of Cambodia

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

The ECCC has scheduled an initial hearing in Case 002/02 against Khieu Samphan and Nuon Chea for 30 July. The charges include genocide against Cham and Vietnamese populations, crimes against humanity (murder, extermination, enslavement, deportation, imprisonment, torture, persecution on political, religious, and racial grounds, other inhumane acts of rape, forced marriage, and attacks against human dignity, and enforced disappearances) and grave breaches arising from their alleged involvement with activities at four security centres, three worksites and a group of adjacent cooperatives. The initial hearing for Case 002/02 is expected to address civil party reparations, preliminary objections and other legal issues and sequencing proceedings, potential witnesses, civil parties and experts.

In addition, the Civil Party Lead Co-Lawyers and the Parties have recently filed motions for protective measures and clarification of the application of Rule 87(4) (on admission of new evidence), respectively. In a direction issued on 12 June, the Trial Chamber noted that the Civil Party requested protective measures for a party but did not specify the measures sought or explain why this was not included, and requested further information. In the Parties' joint request for clarification of the application of Rule 87(4), the parties assert that the limitation on new evidence should apply only to evidence offered after the initial hearing before Case 002/02 begins, as a result of the complications arising from severance of Case 002. The Trial Chamber wrote on 11 June that the heightened standard for admission of new evidence in Rule 87(4) is intended to promote efficiency and it is not convinced by the parties' submissions that the efficiency and fairness of the proceedings will be impeded unless the application of this rule is modified. However, highlighting the Chamber's discretion with regard to evidence admission and the occasional practice of circumventing Rule 87(4) standards, the Chamber indicated its willingness to do the same where application of the Rule results in exclusion of exculpatory evidence or other miscarriage of justice. Whether these particular issues will arise again at the initial hearing in July is unclear.

ECCC Internal Rules
Rule 87(4)
Rules of Evidence
During the trial, either on its own initiative or at the request of a party, the Chamber may summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth. Any party making such request shall do so by a reasoned submission. The Chamber will determine the merit of any such request in accordance with the criteria set out in Rule 87(3). The requesting party must also satisfy the Chamber that the requested testimony or evidence was not available before the opening of the trial.

Case 002/02 is a continuation of Case 002/01, concluded in October 2013, which adjudicated foundational issues and factual allegations upon which Case 002/02 and later cases will be based. Case 002 was severed in 2011 prior to the commencement of Case 002/01 in November 2011. Case 002/01 focused on crimes against humanity for the forced movement of the population out of Phnom Penh and other regions, the execution of Khmer Republic soldiers after the Khmer Rouge takeover in 1975, and the roles of the Accused in the formulation of regime policies relevant to later charges. The verdict for this part is scheduled to be pronounced on 7 August.

DEFENCE ROSTRUM

NIOD Conference "The Trial Record as a Historical Source"

By Camille Sullivan

On 19 june the Institute for War, Holocaust and Genocide Studies (NIOD) Transitional Justice Research Program, in conjunction with the National Archives of the Netherlands, hosted a conference entitled "The Trial Record as a Historical Source". Convened by Nanci Adler, the Manager of Holocaust and Genocide Studies and lecturer at the University of Amsterdam, the conference focused on the interplay between witness testimony, history and the law in the creation of a narrative and the pursuit of historical accuracy. The day consisted of three panels and a round-table discussion, and comprised of a mix of historians, archivists and legal experts. This diversity amongst the presenters enabled a wider consideration of the range of questions the trial record raises and the uses it may serve.

The morning session focused on the trial record as a contributor to fact - or truth - finding, beginning with a discussion by William Schabas from Middlesex University on the resolution of "contested histories" in international criminal trials. Schabas considered the cases of the Katyn massacre in World War II and "Operation Storm" in the Croatian War of Independence to demonstrate that the conclusions reached by international judicial systems do not necessarily clarify historical understanding. In finding the Nazi Defendants not guilty of the Katyn massacre at the Nuremberg Trials, the judges noted that it was not the purpose of the Court to determine whether Germany or the Soviet Union was responsible for the crime, but simply whether the Defendants should be personally found guilty. As a result, Schabas emphasised that the trial record from Nuremberg is confused and does little to clarify the highly contested historical facts surrounding the event, most importantly who was responsible. In a similar vein, Schabas considered the more recent example of "Operation Storm". Given the conviction and subsequent acquittal on appeal of Gotovina and Markač by the ICTY, Schabas questioned how "history" can be ascertained from a trial record that exposes a devastating narrative of fact of the events in Krajina but ultimately concludes that no genocide occurred. What is our understanding of "truth" and "reality" where they can produce different outcomes in a legal versus historical sense?

Vladimir Petrović from the Institute of History Belgrade introduced the idea that there is a "legal bias" in the way in which the trial record presents historical fact. Petrović explained that legal texts are often treated by historians as a ready source of fact without caution. Whilst legal experts and historians share the same base, that being to clarify what happened in the past, they approach this goal from different angles. This contextual difference ultimately impacts, and in Petrović's opinion weakens their compatibility. The trial record is only indicative of the final product of the process of legal investigation. It fails to reveal the reasons for why particular evidence was or was not included, how evidence was obtained and cannot include evidence that is inadmissible but exists in reality. Further, trials are about "who presents the most convincing narrative", which affects whether "truth" is the ultimate goal. In this way the trial is a "powerful beam that can put light on one thing and leave many things in the shadow". Schabas had highlighted how the trial record is "framed by a mix of prosecutorial strategy, politics and policy" when discussing how political influences that may have affected the outcome of the Nuremberg Trials, to which Petrović agreed. Therefore, whilst the trial record is a historical source, we should question how much value it should be accorded.

Historian Thys Bouwknegt expanded on some of the factors that "mutilate the historical record". Firstly, he argued that historians must recognise the limitations of international courts, and in particular the many Tribunals established with a specific mandate, such as the ICTY. These courts are restricted in the geographical scope, the types of perpetrators and the time frame it can investigate. Further, the outcome of a trial is limited to two alternatives, guilty or not guilty, unlike the complex web that is the historical narrative. Therefore, "trials should not be expected to record history and resolve historical conflicts but rather help reduce uncertainties and produce historically

relevant material".

In the second session, Selma Leydesdorff from the University of Amsterdam took this idea further by focusing specifically on how the court room influences witness testimony and thus the narrative of events depicted in the trial record. She characterised witnesses as "actors in a script written by others" to highlight the incompatibility between investigators, who want to ascertain facts and witnesses, who often want the opportunity to tell their story. As one of the only historians to have closely studied the testimony of Alexander Pechersky in the Sobibor trials, she argued that his evidence gradually changed as he was undermined and discredited in several trials and the questions put to him were framed differently. The judicial and inquisitorial language of the court room ultimately dominates the emotion inherent in witness accounts, and this also influences the ability for the trial record to be an accurate historical source.

Given these considerations when using the trial record, the afternoon session focused on the ways in which the trial record has successfully been used by historians. Nerma Jelačić, Director of Communications at the ICTY, discussed the way in which the Court uses the judicial record through the Tribunal outreach programme. She explained how documentaries can be created exclusively from trial material to give an accurate account of events and then used for education purposes. These are often aimed particularly at the younger generation to show them history of their region.

Maartje van de Kamp and Helen Grevers from the National Archives of the Netherlands explained the importance of centralising the database of trial records to enhance accessibility. After World War II the Netherlands established a successful archiving system for all war documents and trial records which can be easily searched. As a result, many interesting historical projects have been based on this material, for example a study on social attitudes in the Netherlands throughout the war.

The presenters all provoked very interesting discussion among the attendees. The point was raised that historians have the choice between trusting the evidence presented in the trial record or using this material to assist in recreating or verifying the information before considering it historically accurate. There is also the issue of material that extends beyond the trial record, for example documents used in pre-trial preparations and the personal notes of Judges and Counsel, and what historical importance these may hold. Overall the conference was thought-provoking as it raised an interesting perspective on the impact of international criminal law and judicial systems, beyond the more traditional notion of justice.

ADC-ICTY Ethics Training: Due Diligence and Making the Record

On 18 June, the ADC-ICTY hosted another lecture by Michael G. Karnavas. The lecture was entitled, "The Diligence that is Due - Making the Record and Perfecting Grounds for Appeal ". Karnavas has a myriad of experience, having appeared before both State and Federal Courts in the United States, the ICTY, ICTR and ECCC. He currently, amongst other positions, holds the role of Lead Counsel for Jadranko Prlić in *Prosecutor v. Prlić et al.* at the ICTY.

The lecture was as interesting as it was informative. It focused on Counsel's duty (particularly for Defence) towards creating a record. A 'record' is as straightforward as it sounds, as it maintains every account of the case thus far. Karnavas stressed that any case-related instances, no matter how seemingly ineffectual, must be put into the record. Therefore, when the case goes to appeal, those details can be re-examined and brought back into the case.

Karnavas emphasised that the basic ethical premise is that, for Defence attorneys, due diligence is owed to a client to uphold their right to a fair trial. Not many would disagree with this and both sides would likely agree that the goal for justice is to, as Karnavas put it, "Get as close to the truth as possible".

That emphasis on finding the truth is increasingly difficult without an accurate record to reflect on the trial proceedings. Karnavas cited the old legal truism from *Jones v. Vacco* (126 F.3d 2nd Circuit 1997): "God may know but the record must show". If the record does not present certain facts or details of the case, then those facts and details can generally not be called upon during appeal. Expanding upon this, Karnavas stated that the most terrifying eight words for

appellate lawyers were: “This issue is not preserved for appellate review”.

Karnavas advised during the lecture to frequently request that a Judge at trial make a ruling on a particular issue. A ruling in this case places something into the record. It is not unfair to say that sometimes even judges have a lack of patience when it comes to almost endless motions and requests. However, this strategy is one based in ethical legal practice: you need to push the envelope to make sure your client gets a fair trial. Diligent standards are actually legally defined within the ICTY Code of Conduct for Counsel in Article 11:

“Counsel shall represent a client diligently and promptly in order to protect the client’s best interests. Unless the representation is terminated or withdrawn, Counsel shall carry through to conclusion all matters undertaken for a client within the scope of his legal representation “.

Karnavas also explained the extent to which ethical standards may apply. You need all due diligence to represent your client in their best interests, yet that does not mean taking every risk that they tell you. Ethical diligence is not achieved through unethical practice. Furthermore, this standard extends to your entire Defence team, not just Lead Counsel.

Towards the end of the lecture, Karnavas left the audience with four basic rules. First, let the Trial Judge know what you want (motion, ruling, etc.) Second, explain why you think you are entitled to it (generally in the language of fair trial rights). Third, explain your entitlements clear enough for the Judge to understand you. And finally, tactically explain your entitlements at a time when the trial court can do something about it. Following these basic rules may annoy a few judges at trial, and that is something Karnavas would not hesitate to say he is guilty of. However, in the interests of fair-trial procedures, due diligence and justice, he would advise, “you have to make the effort. Be like nuclear waste: hard to get rid of”.

The ICC in the Chinese Context: Perception and Prospects

By Garrett Mulrain

On 18 June, the T.M.C. Asser Institute hosted a lecture which was part of the Supranational Criminal Law Lecture series and focused on a topic “The ICC in the Chinese Context: Perceptions and Prospects”. The event was headed by Liu, Secretary-General of the Chinese Initiative on International Criminal Justice (CIICJ). Michael Liu, who is accredited by the Chinese Bar Association, has previously worked for the International Committee of the Red Cross and is currently a Civil Party Lawyer in the Extraordinary Chambers in the Courts of Cambodia.

This lecture came at a decisive time. On 22 May, China and Russia cast negative votes in the United Nations Security Council (UNSC), which nixed a draft resolution that would have referred the situation in Syria to the International Criminal Court (ICC). That particular vote counted 13 members in favour and no abstentions, demonstrating strong approval for a referral. This seems to be the all-too-familiar case of international justice being blocked by a minority of P-5 powers. This comes in addition to China not having ratified the Rome Statute, adopted in July 1998. Through this background, Liu spoke about the contemporary perceptions of the ICC within China, and then moved onto future prospects for a Chinese role within the ICC.

The reason that China voted against the Rome Statute, according to Liu, is the strong perception that the ICC holds as a challenger to state sovereignty. Clearly China is not the exception in this case, since the thought of national authorities being tried by non-national judges is, if nothing else, humbling. China in particular, however, holds the negative perception of the ICC for three primary reasons: the Court’s jurisdiction; the dogmatic immunity of the Head of State within Chinese culture; and the interplay with China’s P-5 membership.

In terms of jurisdiction, the ICC echoes that of international law in general; maximum participation works to achieve maximum universality. This is an issue, however, when addressing a geopolitical superpower, since Chinese state practice rejects jurisdiction of any kind. As referenced by Liu, the Chinese name

for "China" is Zhongguo, meaning Middle Kingdom. While this may reflect a minor form of nationalism, the thought of the ICC stealing jurisdiction from national Chinese courts feeds into a negative perception of the institution.

Regarding Head of State immunity, the Rome Statute rejection comes from a fear of indictment for Chinese officials. This concept is more cultural and it stems from a principle rule within Chinese Legal History: "Penalties do not apply to Mandarins" (state officials). Liu emphasised that besides the political and legal challenges on the surface, the tenant of immunity to Heads of State is one that is culturally ingrained.

The last perceptional challenge offered by the ICC runs in sync with the veto-power of Chinese Security Council membership. The logic herein lies with a fear of a strong ICC, which could potentially dilute the Chinese role in the UNSC. Particularly, although still undefined, for the "crime of aggression" (Article 5(d) of the Rome Statute), the ICC's ability to define what constitutes aggression would seemingly limit the monopoly currently enjoyed by the UNSC. These factors surmise the fear that the ICC challenges the Chinese sovereignty, from supranational to individual levels.

However, despite the negative perception of the Court, future prospects of the ICC falling within Chinese interests may not be far off. As Liu noted, there are at least four factors which demonstrate future potential for involvement. The first is the grass-roots interest in the ICC. Evidently, the Court is studied meticulously by law students and academics alike. Monitoring reports from the CIICJ are always well-received, and there is even a well-developed Chinese ICC Moot-Court competition in Hong Kong.

The second prospect relies on a broad adjustment when viewing the ICC in terms of Chinese politics. Liu correctly noted that China is rarely affected by the majority of ICC cases, since they overwhelmingly involve African states. However, recent UNSC referral practice does not always point towards a tacit rejection of the Court's authority. While the Syrian call before the ICC was indeed rejected, China upheld the Libyan referral to the ICC with UNSC Resolution 1970, which does at least demonstrate an appreciation for the work that the Court does.

Following that, the third prospective Liu spoke of came in the form of a suggestion; the ICC could be utilised by China as a conduit for further state diplomacy. While it may look like China is just an observer on the sidelines when it comes to the interests of wider international justice, Chinese foreign policy does condemn atrocities committed in the third world, and works towards their prevention.

Political interests may be difficult to pin-down at times, however if the ICC is to be instrumental in the forging of peace and diplomacy, then a Chinese ratification of the Rome would not be unthinkable. As Liu noted, "Chinese global interest expands as ICC jurisdiction and power increases", meaning that as China becomes a larger player in the international arena, (particularly for peace-keeping troops and economic investments in Africa) the strengthening of international institutions is a logical development.

The last piece of advice for forging an ICC-China relationship given by Liu was that utilising the moral high ground is a key for success. Chinese media frequently regard Chinese practices as better than that of the Western states, and this feeds into a perception that China has to take the lead in the world. It needs to be proven to Chinese authorities that the ICC (even if just in theory) is a positive institution. This could incentivise the State to become an active contributor to the ICC's development.

One cannot ignore the unfortunate irony amidst this discussion. International criminal justice seems a far off dream when compared to the domestic human rights violations that activists face within the People's Republic of China. Fear of arrest or police intimidation often silences those who would otherwise be critical of the Chinese government. However, what is truly compelling is that for the CIICJ, it was evidently just a manner of explaining that it is within the governments interest to take part in an ICC discussion. This could actually exemplify a strong future prospect for the ICC within the Chinese Context. "Have an open mind", explained Liu in his final remarks, "China will always surprise you".

Book Launch in The Hague on the Special Tribunal for Lebanon

By Isaac Amon

On 17 June, The Hague Institute for Global Justice hosted an official book launch on the Special Tribunal for Lebanon (STL), which was also the official inauguration of Doughty Street Chambers International. The event was well attended, with interns, Judges and Counsel from many different tribunals as well as from embassies and international law firms. The book launch featured a panel that was composed of Amal Alamuddin, a barrister at Doughty Street, John Jones QC, Defence Counsel at the STL and ADC-ICTY member, and Keir Starmer KCB, QC, a barrister in London and the former director of public prosecutions for England and Wales. Norman Farrell, the Prosecutor at the STL, also spoke briefly about the book and its relationship to the STL.

The panel started with the introduction of the book by one of the editors, Amal Alamuddin, who laid out three important points. First, February 2015 is the tenth anniversary of the assassination of former Lebanese Prime Minister Rafiq Hariri, which was the reason for the establishment of the Tribunal in the first place. Second, with over 150.000 people dead and millions displaced in Syria – Lebanon's northern neighbour – and with no prospect of referral to the ICC, there has been talk of a hybrid tribunal modelled on the STL that will similarly investigate the situation in Syria. Third, the STL is extremely unique because although five Defendants have been indicted, none are in custody. It is the first time since the Nuremberg Trials that an international tribunal is conducting trials *in absentia*. This fact has led the STL to promulgate unique Rules of Procedure and the STL also holds the novel distinction of prosecuting individuals for the crime of terrorism in peacetime.

Book Launch Panellists

Jones QC, as Lead Defence Counsel, emphasised that this absence of Defendants is the fundamental difference between the STL and other international criminal courts and tribunals. He posed an essential question: in the absence of Defendants, Judges can judge, Prosecutors can prosecute, but how can defence lawyers effectively defend the Accused?

Due to their absence, if the Defendants are found guilty, then if they are captured they can be retried. However, if they are found not guilty, then they are forever protected from subsequent prosecution – even if later located – by the doctrine of double jeopardy, or *non bis in idem*. Consequently, this legal principle may well provide an incentive to convict these Defendants *in absentia*, rather than run the risk of re-trying these Defendants at a later time if they are caught. As Jones put it, "do not touch the king unless you can kill him". The Defence is put at a severe disadvantage because they cannot confer with their clients. Thus, even information that would normally be stipulated, such as the birth and death dates of individuals, as well as political, cultural and historical events have to be proven in front of the Tribunal.

Farrell commended this book as helping to contribute to a much-needed dialogue on the novel issues that confront the STL as it moves forward in its work. He pointed out that international criminal courts and tribunals normally try people accused of genocide, crimes against humanity and war crimes – crimes that require a systematic and large infrastructure and network in order to commit these crimes. The STL, however, is prosecuting single criminal acts committed by individuals, which is distinctive as well.

Geoffrey Robertson QC, the founder of Doughty Street Chambers, spoke last and asked the audience, if the international community is now willing to sanction trials *in absentia*, why should we not countenance executions *in absentia* as well? Why not put Kaiser Wilhelm II on trial, as almost happened following the First World War? Robertson concluded by saying that if we are going to continue down the path of trials *in absentia*, the precedent has been set to re-enact the great trials of history, change the verdicts, and execute the Defendants, at least symbolically.

Ultimately, we should be cautious of conducting trials *in absentia*, as these Defendants cannot effectively defend themselves. If we truly are dedicated to the rule of law, then equal arms must be available to both the Prosecution and the Defence. As Starmer concluded, the STL is a mix of domestic Lebanese and international law, as well as a mixture of both practitioners and academics. The STL is unique, interesting and will assuredly help to shape the future of international criminal law in the 21st century. All in all, the book launch was quite successful, and no doubt these issues will continue to spark debate for some time to come.

Where Next for the ICC?

By Garrett Mulrain

On 25 June, the T.M.C. Asser Institute hosted a roundtable discussion of Civil Society members, as part of their Supranational Criminal Law Lecture series called "Where Next for the ICC?". The panellists included Paulina Vega of the Mexican Commission for the Defence and Promotion of Human Rights, Andreas Schüller, Programme Director for International Criminal Justice at the European Center for Constitutional and Human Rights and Olexandra Matviychuk, Chairwoman at the Centre for Civil Liberties. The event was moderated by Niall Matthews, Communications Director for the Coalition for the International Criminal Court. The panellists each brought in unique knowledge of the current situations in Columbia, Iraq, United Kingdom (UK) and Ukraine.

The event focused on those cases which are currently undergoing the "Preliminary Examination" phase at the ICC. This phase entails gathering information and evidence to determine if the individual situation reaches the threshold for an ICC indictment. Legal standing for preliminary examinations comes from Article 15 of the 1998 Rome Statute.

Rome Statute
Article 15
The Prosecutor

(1) The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.

(2) The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organisations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

Following Article 15, the Prosecutor may submit their findings to the Pre-Trial Chamber, who may either allow or dismiss an investigation. If dismissed, the Prosecutor is not barred from providing additional information at a later date.

Vega was the first to speak, and emphasised that since there are currently nine different situations under Preliminary Examination, the ICC is widening its focus beyond the African continent. Paulina's primary focus was on the situation in Honduras. The Honduras investigation will focus on the Coup in June 2009, which removed Manuel Zelaya, President of Honduras, from power. Early reports by Amnesty International claim that the Honduran Government allegedly beat and detained hundreds of those opposed to the coup, however the preliminary examination has still failed to conclude if those crimes could reach the gravity of ICC jurisdiction.

Vega then switched attention to the situation in Mexico, where she claims that the "War on Drugs" has killed 80,000 people from 2006 to 2012. She further posited an interesting notion of how this situation could actually fall within ICC jurisdiction when she notes that, "Widespread cartels fit a highly organ ised structure ... [and have] the intention of fear and territorial control". Since the ICC is a court of complementarity (Rome Statute, Article 1), it would initially have to assess whether or not the Mexican Government is willing and able to prosecute these crimes. Unfortunately, this situation is still far from reality, since there is currently no preliminary examination in Mexico.

The next speaker on the panel was Andreas Schüller, who shifted the discussion to Iraq and the United Kingdom. The current preliminary examination is open-ended, and began around 2006. These cases

focus on events during the Iraq War, in which the UK forces made up a portion of the Multinational Force from May 2004 to December 2009. The examination also exists in the shadow of the cases *al-Skeini et al. v UK* (2011) and *al-Jedda v UK* (2011), which have been used to produce further evidence for a potential Office of the Prosecutor (OTP) investigation. These cases bring up an issue of complementarity, since their existence clearly proves a "willing" to prosecute and the UK court system clearly meets the standard of "able" to prosecute. When asked if this exhibition of willing-and-able would cause trial problems down the line, Schüller remarked that just because the UK was willing to prosecute some individuals, it "does not prove they are willing [to] up the chain of command". This evidently leaves us with the UK courts prosecuting at some level, and dismissing the rest to the OTP. While this potentially scattered justice leaves something to be desired, the unfinished preliminary examination will be an interesting development to follow.

Matviychuk took the discussion to Eastern-Europe, where the initial investigation of the Ukraine crisis has found human rights violations over the past two months. She opened with a video clip, portraying violent images of many journalists being beaten. The situation in south east Ukraine alone has resulted in "2.000 cases of protesters being beaten, with over 100 deaths". She claimed that the Russian military "used terror towards those who do not agree with them", since the Crimean occupation of 27 February. Furthermore, the investigation is proving difficult as a result of police allegedly sabotaging the investigation process. Equally challenging is the fact that the Ukraine has not ratified the Rome Statute, giving the ICC limited jurisdiction. Therefore, as Olexandra suggests, to move forward we must eliminate the "vacuum of impunity", that those in the situation benefit from regarding potentially grave atrocities.

The length of time alone for examinations is not structured by the Rome Statute, so they can theoretically go on for years (Colombia's ongoing examination is on its 10th year). Furthermore, preliminary examinations can be opened multiple times, as in the case of Iraq. This caused one audience member to ask a decisive question: "How much hope is there for preliminary investigations?" The answers were mixed, and truly highlighted the structural deficiencies that damage the potential for preliminary examinations. Vega had the most direct answer when she stated, "We are learning by experience". While no legal mind enjoys admitting that international law is deeply flawed, perhaps when it comes to preliminary examinations before the ICC, learning by experience is the best we can hope for.

The 2014 ADC-ICTY and ICLB Mock Trial

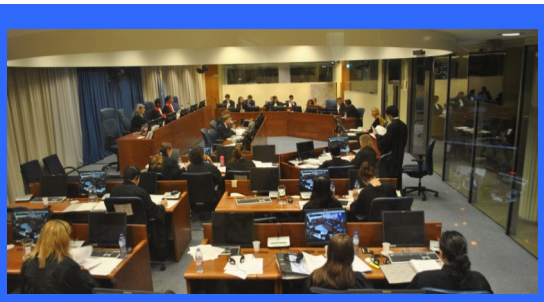
By Simeon Dukić and Yoanna Rozeva

Between 23 and 28 June, the ADC-ICTY and the International Criminal Law Bureau (ICLB) welcomed almost 30 participants to the 2014 edition of their Mock Trial. For the first time since 2010, the Mock Trial was organised as a one week long programme with evening lectures and one day of in-court performance. The case was provided by the ICLB and involved the indictment of three Accused at the ICTY.

ADC-ICTY President Colleen Rohan

The participants came from the various international courts and tribunals, as well as from universities, research centres and law firms abroad. 17 different nationalities were represented and the group of young lawyers was taught by ICTY Defence Counsel in preparation of their performance in court. The participants were split up in one Prosecution team, three Defence teams, three accused and two witnesses for the purpose of the exercise.

The week started with two lectures by Michael G. Karnavas, Counsel for Jadranko Prlić, one on case analysis and one on motion drafting. While the Prosecution team, consisting of nine participants had to submit their outline of the motion already on 25 June, the three Defence teams of each four partici-



Mock Trial Participants in Court

pants and the three Accused received in-depth training by Richard Harvey, Standby Counsel for Karadžić, on oral advocacy skills. They subsequently had 24 hours to respond to the Prosecution motion, while the Prosecution team received their oral advocacy training by Dragan Ivetić, Legal Consultant on the Mladić Defence team.

At the end of the week, ADC-ICTY President and ICLB founding member Colleen M. Rohan gave a presentation on opening and closing arguments, as well as on ethics. The week-long exercise culminated in the day of the Mock Trial performance, where the participants conducted a one-day trial in courtroom 1 of the ICTY. The bench was composed of Judge Janet Nosworthy, Judge Koffi Afande, and ADC-ICTY members Colleen Rohan and Christopher Gosnell.

Every participant had the opportunity to test his or her oral skills in court and the week-long preparation with the guidance from ADC-ICTY Counsel ensured that the importance of team work, preparation and attention do detail was highlighted.

At the end of the day, the bench announced three prizes for best overall team, which was divided between the Prosecution and second Defence team, best orator for the Defence (Molly Martin) and best orator for the Prosecution (Andreas Kolb). The participants received valuable feedback from the Judges for their future careers.

The ADC-ICTY would like to express its sincere gratitude to Judge Nosworthy, Judge Afanđe, Colleen Rohan, Christopher Gosnell, Richard Harvey, Dragan Ivetić and Michael G. Karnavas for their time, support and dedication to this Mock Trial. The ADC-ICTY would also like to thank the respective sections in the ICTY for their excellent support of this event and the ADC-ICTY interns who assisted during the entire week.

ADC-ICTY / ICLB Mock Trial 2014

Please find pictures of the Mock Trial at the following link: *http://gallery.adc-icty.org/#!album-17.*

BLOG UPDATES AND ONLINE LECTURES

Blog Updates

Michael G. Karnavas, **The Diligence That Is Due: Making the Record & Perfecting Grounds for Appeal**, 26 June 2014 , available at : http://tinyurl.com/obt95zz .

Kevin Jon Heller, **Analysing the US Invocation of Self-Defence Re: Abu Khattallah,** 20 June 2014, available at: http://tinyurl.com/npadt68.

Julien Maton, **Charles Taylor Requests Transfer to Rwanda,** 17 June 2014, available at: http://tinyurl.com/pn9pkln.

Beth S. Lyons, **The Intermediary Industry and the ICC**, 6 June 2014, available at: http://tinyurl.com/n6cbopd.

Online Lectures and Videos

"Preventing Mass Atrocities: Lessons Learned from Rwanda", 18 June 2014, available at: http://tinyurl.com/q6osde3.

"Mandela, The Lawyer", by Christine Chinkin, 17 June 2014, available at: http://tinyurl.com/ogk8rns.

"What Are We doing? Reconsidering Juridical Proof Rules", 16 June 2014, available at: http://tinyurl.com/pm7wlbs.

"Models of Legal Proof and Their Modes of Plausibility", 16 June 2014, available at: http://tinyurl.com/pykkyey.

"Supranational Criminal Law Lecture", by Naomi Roht-Arriaza, 19 June 2014, available at: http://tinyurl.com/ppmyqvg.

PUBLICATIONS AND ARTICLES

Books

Caroline Harvey, James Summers, Nigel D. White (2014), *Contemporary Challenges to the Laws of War*, Cambridge University Press.

Helen Duffy (2014), *The "War on Terror"' and the Framework of International Law 2nd Edition*, Cambridge University Press.

Prabhakar Singh, and Benoît Mayer (2014), *Critical International Law: Postrealism, Postcolonialism, and Transnationalism,* Oxford University Press India.

Articles

Yannick Radi (2014), "In Defence of 'Generalism' in International Legal Scholarship and Practice", *Leiden Journal of International Law*, Vol. 27, No. 2.

Pietro Sullo (2014), "*Lois Mémorielles* in Post-Genocide Societies: The Rwandan Law on Genocide Ideology under International Human Rights Law Scrutiny", *Leiden Journal of International Law*, Vol. 27, No. 2.

Scott Robinson (2014), "International Obligations, State Responsibility and Judicial Review Under the OECD Guidelines for Multinational enterprises Regime", *Utrecht Journal of*

CALL FOR PAPERS

Kyiv-Mohyla Law and Politics Journal has issued a call for papers on topics such as the Rule of Law, Theory of Argumentation, and International Human Rights.

Deadline: 29 July 2014 More info: http://tinyurl.com/lqsztf9

The **Faculty of Law at the University of Ghana, Accra** has issued a call for papers for "Traditions, Borrowings, Innovations, and Impositions: Law in the Post-Colony and in Empire".

Deadline: 1 December 2014 More info: http://tinyurl.com/my2mtlh

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 sincere appreciation and gratitude to ADC Head Office intern Vesselina Vassileva for her excellent work and commitment to the Association. Vesselina has been with the ADC for the past five months and has been in charge of the Newsletter. Her support and assistance was invaluable. We wish her all the best fur the future, she will be missed!

EVENTS

Using Human Security as a Legal Framework to Analyse the Common European Asylum System

Date: 4 July 2014

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

More info: http://tinyurl.com/nttb27t

Finishing the Job in the Balkans

Date: 16 July 2014

Location: The Hague Institute for Global Justice, The Hague

More info: http://tinyurl.com/n2r8xbb

Countering Terrorism in the post-9/11 World: Legal Challenges and Dilemmas

Date: 25-29 August

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

For more info: http://tinyurl.com/mgmjcxy

OPPORTUNITIES

Associate Research Officer (P-2), The Hague

Registry/Archives and Records Section, MICT

Closing Date: 5 July 2014

Assistant Legal Officer (P-1), The Hague

Registry/Counsel Support Section, ICC

Closing Date: 6 July 2014

Associate Human Resources Officer (P-2), The Hague

Human Resources Section, ICC

Closing Date: 20 July 2014

Join Us!

ADC-ICTY

Affiliate Membership

For more info visit:

http://adc-icty.org/home/membership/index.html

or email:

iduesterhoeft@icty.org