

STANIŠIĆ & SIMATOVIĆ

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MICT News

Prosecutor v. Stanišić & Simatović (MICT-15-96)

On 27 October, the Defence for Jovica Stanišić filed a request to the Trial Chamber to stay the proceedings until the Prosecution respects the principles of finality and the Appeals Chamber’s order for retrial. The motion argues that the Pre-Trial Brief filed by the Prosecution on 5 September 2016 amounts to “such an egregious violation of the Accused’s rights that it is detrimental to the Court’s integrity, contravenes any sense of justice, and makes a fair trial impossible”.

The reasoning behind the motion rests on the argument that the Pre-Trial Brief filed by

the Prosecution does not respect the principles of *res judicata* and *non bis in idem* as well as the order for retrial from the Appeal Chamber. More specifically, the Defence argue that part of the findings from the previous trial were not appealed by the Prosecution, and are therefore already fully litigated, or *res judicata*, and according to the principle of *non bis in idem* cannot be brought back in the new trial.

Moreover, the Defence claims that the Prosecution is significantly expanding the evidentiary basis for the retrial as well as adding counts and charges that were not part of the first case against the Accused,

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even though the Appeals Chamber expressly limited the retrial and ordered that Stanišić “be retried on all counts of the Indictment”. Examples of this expansion of the evidentiary basis include at least 63 new witnesses, 16 new locations and numerous new crimes including sexual violence, killings, beatings, forced labour, use of human shields and the destruction of property.

The Defence concludes that the Prosecution is pursuing a conviction at all costs by “seeking to deprive the Accused of a multitude of positive and final findings whilst concurrently adding or expanding specifically selected charges in the circumstances of a retrial”. According to the Defence this gives the Prosecution an unfair advantage and makes it impossible for the Accused to have a fair trial.

The Defence requests that the Trial Chamber stay the proceedings until the Prosecution’s case is amended in a way that respects the principles of *res judicata* and *non bis in idem* as well as the orders for a retrial of the Appeals Chamber. The Prosecution has two weeks to provide a response to this motion, and as yet an official response has not been filed.

ICTY News

Prosecutor v. Mladić (IT-09-92)

On 25 October 2016 both the Prosecution and the Defence filed their respective Final Briefs. Closing arguments are expected to begin on 5 December 2016 and continue until 15 December 2016.

Prosecutor v. Jojić et al. (IT-03-67-R77.5)

On 27 and 28 October 2016 the ICTY and MICT Prosecutor, Serge Brammertz, visited Belgrade to stress Serbia’s obligation to extradite three of its nationals to The Hague to be tried for contempt. There is an outstanding arrest warrant for Petar Jojić, Vjerica Radeta and Jovo Osojić for charges of witness intimidation and interference in the course of the *Šešelj* case. Jojić and Radeta are lawyers serving on *Šešelj*’s defence team, and Osojić is a former war companion of one of the witnesses in the case.

Serbia has thus far refused to extradite the three accused on the basis that the request is not in line with Serbian law and the extradition may affect national security. Some observers suspect that the reasons for the refusal are more political than legal, given that the three accused are members of the Serbian National Party. However, the Higher Court in Belgrade ruled in May 2016 that the three accused could not be extradited as Serbia only has the authority to arrest those wanted by the ICTY who are charged with war crimes, genocide or crimes against humanity - although Serbia has cooperated with the Tribunal on contempt matters in the past.

Serbia is likely to face international criticism if it continues to refuse to extradite the three accused. However, in Serbia analysts are suggesting that the negative consequences of non-cooperation may not be as severe as in previous times. Nevertheless cooperation



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with the ICTY is a key requirement in Serbia’s negotiations with the EU, and this latest development could hamper Serbia’s progress towards EU accession. One other possibility to resolve this issue would be for Serbia to prosecute the three accused domestically, although that too would not be without its challenges.

News from other International Courts

International Criminal Court



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The Prosecutor v. Bemba et al. (ICC-01/05-01/13)

On 19 October 2016, Trial Chamber VII of the ICC, composed of Judge Bertram Schmitt (Presiding), Judge Marc Perrin de Brichambaut and Judge Raul Cano Pangalangan, found the five accused in the *Bemba et al.* case guilty of various offences against the administration of justice. The offences in question were related to *The Prosecutor v. Jean-Pierre Bemba Gombo* (Main Case), and concerned the false testimonies of defence witnesses in the Main Case.

The five accused were Bemba; Bemba's former counsel, Aimé Kilolo Musamba; a former member of Bemba's defence team, Jean-Jacques Mangenda Kabongo; a political ally of Bemba's in the Parliament of the Democratic Republic of the Congo, Fidèle Babala Wandu; and a potential

defence witness in the Main Case who ultimately did not testify, Narcisse Arido. The trial opened on 29 September 2015, the Trial Chamber closed the submission of evidence in the case on 29 April 2016, and closing statements took place on 31 May and 1 June 2016.

Kilolo, Mangenda, and Bemba himself, were found guilty as co-perpetrators, for having intentionally influenced 14 defence witnesses and presented this false evidence in court. Bemba was further found guilty of soliciting the presentation of this false testimony. Kilolo was found guilty of inducing the 14 witnesses to give false testimony. Mangenda was found guilty of aiding the giving of false testimony of two witnesses, and abetting the giving of false testimony of a further seven witnesses, but



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was found not guilty of having aided, abetted, or otherwise assisted in the giving of false testimony of the five other witnesses.

The Prosecutor and the Defence were given 30 days to appeal the judgment. With regard to sentencing the judges may impose a maximum term of five years' imprisonment and/or a fine, and the Trial Chamber will issue a decision on the penalties at a later date.



Extraordinary Chambers in the Courts of Cambodia

Francesca Braga, Legal Intern, Meas Muth Team

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Nuon Chea Defence

In September, the Nuon Chea Defence Team continued to be engaged in the Security Centres and "Internal purges" segment of the Case 002/02 trial as well as in the Regulation of Marriages segment.

Alongside, it filed a series of requests before the Trial Chamber, some of which are summarized below.

On 2 September 2016, the Defence filed a public version of its requests related to the upcoming testimony of Nakagawa Kasumi,

who was appointed as an expert witness on the topic of the Regulation of Marriage during the Democratic Kampuchea ("DK") Regime. The Defence sought the admission into evidence of her Curriculum Vitae, as it relates to her background and expertise and is therefore relevant to her credibility and

the weight to be attributed to her evidence, as well as of an expert report on the question of forced marriage during the Sierra Leonean conflict which was admitted into evidence at the Special Court for Sierra Leone. Finally, the Defence requested to be provided with a number of documents underlying her publications on Gender-based violence during the DK Regime, in order to analyse the basis for her evidence.

On 19 September, the Defence responded to the Civil Party Lead Co-Lawyers' request for clarification relating to the status of the charges in Case 002, which were outside the scope of Cases 002/01 and 002/02. The Defence did not oppose the Request, but requested the Trial Chamber to include Kroch Chhmar Security Centre in any future discussions. After noting the Civil Parties' omission of any reference to the Kroch Chhmar Security Centre, the Defence explained that this omission was yet another example of the constant attempts by some parties before the ECCC to avoid discussions concerning any involvement of senior officials of the current Cambodian government in alleged crimes during the DK Regime. The Defence noted that the events in Kroch Chhmar Security Center were particularly relevant to the *mens rea* of the alleged crimes against the Cham people charged in Case 002, in particular persecution and genocide.

Finally, on 23 September 2016, the Defence requested the Trial Chamber to summons Mr. Patrick Heuveline as a demographics expert in relation to the issue of the death toll during the DK Regime. It also requested

the admission into evidence of his latest demographic study concerning the number of accidental deaths during the DK Regime, as it constitutes the latest study in this field. Even though the Defence disputed some of his findings, it considered that Mr. Heuveline can assist the Chamber and the parties in understanding the different methods used by previous researchers when attempting to estimate the death toll between 1975 and 1979, and in assessing the reliability of those findings in the absence of both comprehensive forensic investigations and relevant consensus.

In October 2016, the Defence participated in court hearings regarding the segments on Security Centres, "Internal purges", Regulation of Marriages as well as the nature of the armed conflict. Further, on 11 October, the Defence requested to be granted a 600-page limit as well as an additional month to draft its closing brief, on the basis of the unprecedented scope and complexity of the case. The Defence explained that Case 002/02 was one of the largest cases in international criminal law in terms of temporal and geographical scope, as well as in terms of number of crimes charged and alleged modes of liability. It highlighted that 155 individuals came to testify so far and that more were coming and that more than 10,000 documents have been admitted into evidence, which all require careful analysis in preparation for the closing brief. The Defence further stated that it had to address new complex factual issues that pertain to both Case 002/01 and Case 002/02, but must also address new

issues which did not form part of the discussion in Case 002/01.

Moreover, the Defence recalled that Mr. Nuon Chea was being charged with 22 crimes through six different modes of liability in respect of each of them, including commission through Joint Criminal Enterprise, all of which had to be addressed. It also emphasized that Case 002/02 dealt with a wide range of complex legal issues requiring in-depth analysis. The Defence also referred to the Case 002/01 Appeals Judgement, scheduled for 23 November 2016, which should address some of the factual and legal issues, and its impact, both in terms of time and substance, on the preparation of the closing brief.

The Defence argued that a well-reasoned closing brief with the necessary amount of details would assist the Trial Chamber in ascertaining the truth by providing clear arguments and thorough discussions on all key issues. For the same reasons, the Defence requested an extension of time to review the evidence, and to effectively and clearly present its arguments. The Defence further explained that the upcoming Appeals Judgement in Case 002/01 would significantly impact on the preparation of the closing brief and that sufficient time was required in order to review it. Finally, the Defence also requested that a trial management meeting be held, pursuant to Rule 79(7) of the Rules, in order to discuss the modalities for the preparation of the closing briefs.

Khieu Samphân Defence

In September, the Khieu Samphân Defence Team prepared for and attended the hearings in Case 002/02, including witness testimony regarding the purges, the regulation of marriage, S-21, and “expert” testimony on the regulation of marriage (Kasumi Nakagawa). Further, the Defence prepared for and attended “key document” presentation hearings concerning the regulation of marriage.

On 8 and 15 September, the Defence orally opposed the proposed testimony of additional new witnesses from Cases 003 and 004.

In September, the Defence also filed several submissions (E441, E327/4/6, E439/1, E434/1/1, and E433/1). In particular, on 12 September, it requested the disclosure and admission of all available audio recordings of written records of interview from Case 003 and 004 admitted in Case 002/02, with the sanctioning of the Prosecution by the Chamber for breach of its disclosure obligations (E441). On 19 September, the Defence responded to the Civil Party Lead Co-Lawyers’ request for clarification relating to remaining charges in Case 002. It stated that the silence of the Chamber regarding these charges amounts to a serious violation of the rights of Khieu Samphân to legal certainty and to be tried within a reasonable time. The Defence recalled that it already complained about this situation in May 2014 (E439/1).

In October, the Defence prepared for and attended the hearings in Case 002/02, including witness testimony regarding the regulation of marriage, purges and the armed conflict, and expert testimony on the regulation of marriage (Peg LeVine) and on the armed conflict (Stephen Morris).

In October, the Defence also filed several submissions (E319/56/2, E393/3/1, E437/1, E315/1/8, E408/6/1, E421/5/1 and E306/7/3/1/2). In particular, on 3 October, it opposed International co-Prosecutor’s requests to admit dozens of documents from Case 003 and Case 004 (E319/56/2) and Co-Prosecutors’ requests to admit other new documents (E393/3/1, E437/1). On 13 October, the Defence sought clarification regarding the potential testimony of two individuals it proposed at the very beginning of the trial (E408/6/1). On 24 October, the Defence responded to the Lead Co-Lawyers’ immediate appeal concerning the charges of rape outside the context of marriage, arguing the inadmissibility of the appeal since the said charges have been dismissed during the investigative stage and do therefore not form part of the *saïsine* of the Trial Chamber (E306/7/3/1/2).

Meas Muth Defence

In September, the Meas Muth Defence Team filed an appeal against a decision to disclose Case 003 documents into Case 002. It also filed a response to the International Co-Prosecutor’s request for an extension of time to respond to the appeal.

In October, the Defence filed a response to a request by the International Co-Prosecutor and prepared several submissions to be filed in November.

The Defence continues to review material on the case file and to prepare submissions to protect its client’s fair trial rights and interests.

Ao An Defence

In September, the Ao An Team filed two annulment applications to the Pre-Trial Chamber. The Defence also filed replies to International Co-Prosecutor’s response regarding these applications. In addition, the team submitted a request for case file access for its *pro bono* member.

In October, the Defence filed a notice of appeal against the International Co-Investigating Judge’s Decision on AO An’s Sixth Request for Investigative Action.

The Defence continued to review all the evidence in the Case File and prepare submissions in order to safeguard Ao An’s fair trial rights.

Yim Tith Defence

In September and October, the Yim Tith Defence Team continued to analyse the contents of the case file in order to participate in the investigation, prepare Mr. Yim Tith’s defence and endeavor to protect his fair trial rights.

Im Chaem Defence

In September, upon the Im Chaem Defence Team's request, the Pre-Trial Chamber confirmed that the decision on Ao An's annulment application regarding all

unrecorded interviews will not impact Case 004/01.

The Defence is currently preparing a response to the Co-Prosecutors' Final Submissions, notified to the Defence on 28

October, based on a thorough review of the Case File.

The Defence endeavours to safeguard Ms. IM Chaem's fair trial rights in the remaining proceedings of the pre-trial stage of Case 004/01.



Special Tribunal for Lebanon

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The Prosecutor v. Ayyash et al. (STL-11-01)

On 30 August, Counsel for Sabra continued the cross-examination of Philips, which had begun a year earlier in August 2015. The witness spoke about the potential manipulation of call data records (CDRs) within a network and about a section on the manipulation of CDRs in the report he drafted. He was also asked about the possibility of accidental or deliberate interference with network coverage and about the uses and limitations of cell site evidence.

Counsel for Ayyash cross-examined the witness on his experience and qualifications including his interpretation of the CDRs. Counsel for Ayyash sought to exclude certain pages of Philips' report, "Common Mission Phones," dated 29 June 2015, on the basis that he lacked the qualifications to provide an opinion as to the hierarchy of mission phones.

The Prosecution asked Philips to make some clarifications regarding cell site

analysis. The witness was asked to clarify how he defined cell site analysis, call flow, and call patterns. He was also asked about his experience in interpreting CDRs.

On 31 August, the Trial Chamber rendered a decision on Counsel for Ayyash's request concerning the exclusion of parts of Philip's report after hearing the evidence of Philips and the submissions of the parties. The Trial Chamber stated it was satisfied that the opinions expressed in Philips' report fall within his expertise and would allow him to give those opinions.

During the hearing, the witness spoke about his report on the common mission phones, the features and use of these phones, and how an individual can be associated to a criminal activity by demonstrating that the different phones used have the same user.

On 1 September, Philips gave evidence on his analysis of the Red, Green and Blue networks that were allegedly used by the accused and explained how they matched the criteria of mission phones having the same group of users. He also spoke about

common phases among the mission phone groups, his analysis of the common call patterns and the common areas of use. The witness was then asked whether there were indications that the three networks had a mutual objective by reference to their final calls.

On 2 September, Philips explained the overlapping of calls between phones and gave examples of instances of co-location of phones from the alleged networks.

The witness also spoke about the hierarchal call flow (pattern of calls) and the exceptional call activity that he identified, as well as dates, times and locations for each.

On 5 September, Philips was asked about the functions and characteristics of the Red, Green and Blue networks, and their alleged purposes in the mission set-up phase. The witness testified about the exceptional call activity of the three network phones at unique locations, and then discussed their call flow and sequence with the command mission phone group on specific dates and occasions.



JUDGES IN AYYASH et al.

On 6 September, Philips spoke about the Red network and how this group allegedly maintained its high degree of anonymity. He also explained the specific features and call patterns associated with the three members of the mission command group, which are three Green phones attributed to the accused Ayyash, Merhi, and the former accused Badreddine.

The witness then explained the high degree of mobility of the three mission phones attributable to Ayyash. He also said that the use of Ayyash's Green phone was frequent up to the day of the attack, 14 February 2005, but usage changed significantly after that date. He then spoke about the synchronized and coordinated sequence of final calls that were made by the mission phones when the late Prime Minister Rafik Hariri departed from the parliament en route to the eventual crime scene.

On 6 September, Matthew Barrington continued being cross-examined by Counsel for Sabra, which had begun in July 2015. The witness was questioned about two particular interviews he conducted when he worked with the UNIIC. The first was in September

2007 with the Syrian Military Intelligence Brigadier-General, Burhan Qaddour, who was the Head of the Information section situated in the Anjar office of the Syrian Military Intelligence in Lebanon. The second was in August 2007 with Ibrahim Sharara, who according to the witness had a well-established relationship with the Syrian military intelligence.

On 8 September, the Trial Chamber delivered three oral decisions. The first two decisions concerned the Prosecution's motion for the admission of witness statements signed by protected witnesses, PRH 705 (representative of Touch telecommunication company) and PRH 707 (representative of Alfa telecommunication company). The Trial Chamber admitted the exhibits previously marked for identification into evidence and explained that only the paragraphs tendered by the Prosecution were to be included in the exhibits and that separate exhibit numbers would be given to the remaining annexes as soon as possible. The third decision was in regard to the Prosecution's motion for the admission of cell site evidence. The Trial Chamber granted the Prosecution's motion and admitted into evidence those items not already in evidence.

Andrew Fahey continued his testimony from November 2015. He had previously testified about the electronic presentation of evidence (EPE) software and the types of evidence that are loaded into it. During the hearing, he was asked about the cell site evidence of the telecommunication companies Alfa and Touch to be entered into

the EPE software. He also spoke about the three categories of cell site information stored within the EPE: mast (tower) locations, cell site azimuths (angles of coverage), and the best server coverage plots (identification of cells expected to be

used by a mobile device most often in particular areas). He then explained the different sources that he used for coordinates, azimuth coverage, best server coverage plots and cell identity codes in relation to cell site maps.

Fahey then gave evidence on a comparison he undertook of the Alfa cell site evidence and earlier coverage maps received by the OTP from Alfa from July 2005. Mr Fahey explained how he looked at how the coverage may have changed at the end of 2005. The witness then confirmed two of his witness statements from August 2015, which were admitted into evidence.

On 9 September, Counsel for Sabra continued the cross-examination of Matthew Barrington. The witness was questioned about investigations into a possible suspect in the purchase of the Red mobile phone lines and on some of the interviews he conducted when he was working with the UNIIC. He was also asked about his knowledge, through the investigations he carried out, of specific individuals and their connections to each other.

On 14 and 15 September, Andrew Fahey was cross-examined by Counsel for Ayyash. He was questioned about the capabilities of the EPE software, his work with the OTP, and his

analysis of the telecommunications data. He then spoke about the shape files (geospatial data files) received from Touch, the predicted coverage plots and drive tests (analysis of the quality of cell coverage in a given area).

Counsel for Oneissi also cross-examined Fahey. She asked the witness about the methods and materials he used to establish the map coordinates for certain places and landmarks. Fahey also spoke about the maps created for the OTP by a company called GeoVision in September 2010 and the accuracy of their data set, which he used in the EPE.

On 15 September, Timothy Holford returned for cross-examination by Counsel for Merhi. His examination-in-chief was completed in October 2015 by the Prosecution. He was questioned about his January 2016 and May 2013 witness statements and about attempts he made, on behalf of the OTP, to interview an individual referred to during the hearing as "Chukr." Holford was asked about an interview with Chukr by the Internal Security Forces (ISF) in December 2011 where (according to the interview records) Chukr stated that his wife had an uncle named Mustafa Badreddine, but that he never got to meet him. Holford added that the OTP has extensive communication records showing that Chukr and Sami Issa (alleged by the Prosecution to be an alias for Badreddine) were regularly meeting.

The witness was further questioned about his role, as part of the investigations coordination team, within the OTP and

interviews he participated in with two protected witnesses representing the telecommunications companies Touch and Alfa.

The Prosecution conducted a brief re-examination of Holford regarding interviews with individuals affiliated with Hezbollah.

On 16 September, protected witness PRH 539 was examined about his witness statements of August 2015 and December 2014. Counsel for Oneissi cross-examined the witness about his work with the UNIIIC and the STL.

For the remainder of the day, the Trial Chamber dealt with evidentiary and procedural matters.

On 27 September, Helena Habraken testified about the preparation and content of an extensive document on cell site data. Habraken was examined about phone numbers from the OTP call sequence table (CST) database that she examined for SMS content and on how she determined whether there was SMS content for these numbers. The phone numbers in the CSTs include the numbers associated with the various networks that were allegedly used by the accused in preparation of the 14 February 2005 attack. Counsel for Ayyash cross-examined the witness on her work at the OTP and her witness statement of September 2016.

On 28 September, the Trial Chamber ordered the identities of protected witnesses PRH 339, PRH 449, and PRH 685 to remain confidential. Prosecution Counsel

read a summary of four witness statements related to the attribution of phone numbers to Sabra. The Prosecution also tendered for admission into evidence nine civil defence records to support its theory that Ayyash was present in Lebanon between 16 and 25 January 2005, in order to help prepare for the attack against Prime Minister Hariri.

On 5 and 6 October, PRH 101, who worked as a bodyguard for late PM Hariri in late 2004 and early 2005, testified before the Trial Chamber.

During his testimony-in-chief, the witness spoke about his role as a bodyguard for PM Hariri (specifically in the period between late 2004 and early 2005) and about Yahya El-Arab, the head of the Civilian Protection Detail, in charge of PM Hariri's Civilian Protection. He was asked about his interviews with the United Nations International Independent Investigation Commission (UNIIIC) and the STL, and about the list of telephone numbers of the Civilian Security Staff of PM Hariri mentioned in those meetings. He was further asked about certain phone calls he made and received in late 2004 and early 2005.

PRH 101 also gave evidence about the convoy routes that were taken and PM Hariri's visits to different Lebanese politicians, including Hezbollah Secretary-General Hassan Nasrallah. He was also asked about PM Hariri's private plane, which was at the Beirut airport, and about a trip the witness made with Mr El-Arab on 7 February 2005 to pick up PM Hariri from the airport.

Defence Counsel for Ayyash cross-examined PRH 101, questioning him about his experience in security and protection, about PM Hariri's protection team, and about the exceptional protection measures that were adopted at the end of 2004 and early 2005. He was also questioned about the day of the attack, 14 February 2005, and the usual route taken by PM Hariri's convoy to the parliament.

On 10 October, OTP analyst Andrew Fahey returned for cross-examination by Defence Counsel for Ayyash. He was questioned about the updated EPE data sheet and the map file that were disclosed to the Defence on 30 September 2016.

Counsel for Oneissi also cross-examined Fahey on the comments made by PRH 707, a witness representing Alfa Telecommunications Company, regarding the sources of the information that Fahey had selected for use in the EPE. He was further questioned about the comparison of Alfa's cell site evidence to the coverage maps as well as about the comparison of a selection of coverage plot files with maps received in 2007 that he discussed in his witness statement of May 2016. He then spoke about the coverage plot shape files provided by Alfa, which he also selected for his use in the EPE.

From 11 to 13 October, PRH 009, who worked as part of PM Hariri's convoy, testified before the Trial Chamber. During his examination-in-chief, PRH 009 gave evidence about phone calls he made and received at the end of 2004, when he was

accompanying PM Hariri. He also spoke about PM Hariri's trips and the route taken by the convoy on the day of the attack.

The witness was cross-examined by the Legal Representative of Victims on what happened to him when the explosion took place and about the consequences to his mental health.

Counsel for Sabra cross-examined the witness on a number of events that occurred in the months prior the assassination of PM Hariri, including the reduction of his Internal Security Forces (ISF) security apparatus from 40 to 8 and the impact of the removal of measures intended to detect security threats. He was also asked about the removal of police patrols stated in the St Georges area before the attack.

The witness also discussed the surveillance of PM Hariri and the Quraitem Palace in the weeks leading up to the assassination, as well as the call activity and whereabouts of certain people in the security apparatus during that period. He was then questioned about protected witness PRH 247's June 2014 witness statement.

Counsel for Ayyash cross-examined the witness on his relationship with the late Wissam El-Hassan, a brigadier general of the ISF and the head of its intelligence-oriented information branch. The witness was then asked about certain information provided in the witness statements of PRH 016 from April 2016, PRH 559 from June 2014, PRH 009 from September 2010, and PRH 101 from September 2010.

Counsel for Merhi cross-examined the witness in a private session.

Akhbar Beirut S.A.L. and Ibrahim Mohamed Ali Al Amin (STL-14-06)

On 29 August, STL Contempt Judge Nicola Lettieri [sentenced Ibrahim Al Amin to a 20,000 Euro fine and Akhbar Beirut to a 6,000 Euro fine](#), both to be paid fully by 30 September 2016. The sentence was delivered in a public hearing and followed sentencing submissions by both the *Amicus Curiae* Prosecutor and Defence Counsel.

In his [judgment of 15 July 2016](#), Judge Lettieri had found both Accused guilty of one count of contempt for knowingly and wilfully interfering with the administration of justice. The charges stemmed from the publication of information on purported confidential witnesses in the *Ayyash et al.* case, undermining public confidence in the Tribunal's ability to protect confidential witness information.



IBRAHIM AL AMIN

News from the Region



Bosnia and Herzegovina

Former Bosnian Croat Soldiers Arrested on Suspicion of War Crimes

The State Investigation and Protection Agency police on 31 October 2016, arrested ten former Bosnian Croat soldiers on suspicion that they committed crimes against Serbs from April 1992 to July 1993 in Orasje. The prosecution alleges that the suspects were members of the Croatian Defence Council, its military police and police force, and guards at detention camps and other detention facilities.

The arrests have been condemned by the Croatian Prime Minister, Andrej Plenkovic, President Kolinda Grabar-Kitarovic and Foreign Minister Davor Ivo Stier. In addition, hundreds of residents of the predominantly Bosnian Croat town of Orasje have been protesting against the arrests, arguing that the suspects had only defended the town from Serb attacks.

Former Bosnian Military Security Officer Sentenced for Crimes Against Serb Detainees

Ekrem Ibračević, former Bosniak military security officer, was sentenced to three years imprisonment for inhumane conditions and hitting a detainee at a detention facility in Rapatnica, in the Srebrenik area of Bosnia and Herzegovina, where Serb civilians were held in 1992. The court found that the consequences of Ibračević's actions were not as severe as in grave war crimes cases, and so the three-year sentence was reasonable.

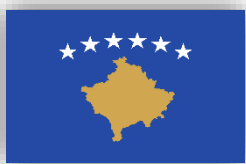
Ibračević and his co-defendants, Faruk Smajlovic, a former military police traffic section commander who was in charge of guarding detention facilities, and former military policeman Sejdalija Covic, were acquitted on all counts of torture and inhumane treatment. The court said that there was no doubt that Serb civilians were treated unlawfully, but based on the evidence presented at trial it was not possible to determine Ibračević's participation in the unlawful detention or that others committed actions on Ibračević's authorisation or consent, nor was the court able to determine that the defendants personally committed the actions described in the indictment. The verdict can be appealed.

Serbia



Belgrade's Humanitarian Law Centre Files Criminal Complaint Against Yugoslav Army Commander

The Humanitarian Law Centre (HLC) in Belgrade has filed a criminal complaint to Serbia's War Crimes Prosecution against former Yugoslav People's Army commander, Dusan Loncar, for ordering a deadly attack on the village of Lovas, Croatia in 1991. The HLC allege that Loncar ordered his subordinates to drive out Croatian fighters, police and any locals who were showing hostility. According to the HLC, an artillery attack killed two Croat civilians, and following that members of the "Dusan the Mighty" paramilitary group entered the village on Loncar's orders and by started indiscriminately attacking. The attack resulted in the destruction and damage of civilian property and death of 21 civilians. A number of lower-ranking fighters are currently being retried for the attack on Lovas, after Serbia's Appeals Court annulled the original verdict in 2014. The HLC emphasised that because no higher-ranking officers have been prosecuted for the attack it was forced to submit this complaint to "motivate the system".



Kosovo

Former guerrilla commander charged with war crimes

The Special Prosecution in Kosovo filed an indictment against former guerrilla commander Fatmir Limaj for the murder of two Kosovo Albanian civilians in October 1998. At the time of the murders, Limaj was commander of the 121st Brigade of the Kosovo Liberation Army ("KLA"). It is alleged that Limaj saw the bodies of the two murdered Kosovo Albanians but failed to take reasonable and necessary measures to investigate the murder and prosecute the perpetrators, nor did he report the case to the relevant authorities for investigation and prosecution.

Limaj's lawyer, Tahir Rreci, says that they will challenge the indictment as there was no structured organisation within the KLA at the time Limaj was the commander of the 121st Brigade. Rreci also claims that the territory where the murder happened was under the control of Serbian police and military forces at the time.

Limaj currently leads the opposition NISMA (Initiative for Kosovo) Party and is a Member of Parliament in the Kosovo Assembly. Limaj has been tried and acquitted of war crimes several times in the past by the ICTY and Kosovo Appeals Court.

The Kosovo Prosecutorial Council responded to the criticism that indictment is politically motivated, saying that such criticism is unacceptable and extremely harmful for the rule of law in the country. The Prosecutorial Council has full competence to address war crimes in the country, and considers the attacks and political propaganda against the Prosecutor as an intervention in the fundamental principle of the independence of the prosecutorial system.



FATMIR LIMAJ

Looking Back...

International Criminal Tribunal for Rwanda (ICTR)

Five years ago...

On 17 November 2011, Trial Chamber III of the ICTR sentenced Grégoire Ndahimana to fifteen years imprisonment. Ndahimana was former Mayor of Kivuma Commune in Kibuye and was found guilty of genocide and extermination as a crime against humanity. The Trial Chamber considered the fact he was in a position as the leading political authority in Kivumu Commune to be an aggravating factor, however most the Trial Chamber found this was mitigated by the fact that he did not have the same *de facto* authority as exercised by Bourgmestres who were members of the National Republican Movement for Democracy and Development. The majority of the Trial Chamber found another mitigating factor in that the scale of the operations reflected broad coordination among various groups and authorities, as well as civilian assailants. The Chamber recognised that while this did not in any way exonerate the Accused it suggested that his participation through aiding and abetting may have been caused by duress rather than extremism or ethnic hatred.

International Criminal Court (ICC)

Ten years ago...

On 9 November 2006, the hearing for the confirmation of charges against Thomas Lubanga Dyilo started at the ICC. Lubanga was charged on the basis of individual criminal responsibility with war crimes for enlisting children under the age of fifteen, conscription of children under the age of

fifteen and using children under the age of fifteen to participate actively in hostilities. This was also the first time in international criminal proceedings that victims participated.

After the hearing of all the statements and the presentation of the evidence, the Pre-Trial Chamber decided to confirm the charges on 29 January 2007 and on 14 March 2012. After trial Lubanga was sentenced to fourteen years imprisonment for the above mentioned charges. The Appeals Chamber confirmed this sentence on 1 December 2014. He is currently serving the remainder of his sentence in the Democratic Republic of the Congo.

International Criminal Tribunal for the former Yugoslavia (ICTY)

Fifteen years ago...

On 2 November 2001, the Trial Chamber of ICTY rendered its judgement against Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić and Dragoljub Prcać. The accused were charged with persecution, other crimes against humanity and war crimes committed in the region of Prijedor. The case concerned the Serb take-over of Prijedor, and the detention of non-Serbs in the Omarska, Keraterm and Trnopolje camps.

The Trial Chamber recognised that there was a widespread and systematic attack against the Muslim and Croat civilians in Prijedor, and concluded that the war crimes of persecution, murder, torture and cruel treatment were committed. The Trial Chamber found Kvočka, Kos, Radić, and Prcać, guilty of the persecution, murder and torture, for their respective roles in the Omarska camp. Žigić was convicted of the same crimes, and also for crimes committed in the Keraterm and Trnopolje camps. Each of the accused were convicted as members of a joint criminal enterprise for the crimes committed in Omarska, and Žigić was convicted alone for the crimes committed in Keraterm and Trnopolje. Kvočka was sentenced of 7 years imprisonment, Kos was convicted of 6 years imprisonment, Radić was convicted of 20 years imprisonment, Prcać was convicted of 5 years imprisonment and Žigić was convicted of 25 years imprisonment.

Defence Rostrum

The ICC and Afghanistan

By Emily Ghadimi

In an article published in [Foreign Policy](#) on 31 October 2016, David Bosco broke the story that the ICC Prosecutor, Fatou Bensouda, was poised to open an investigation into possible war crimes and crimes against humanity in Afghanistan, including those potentially committed by US personnel.

Bosco refers to multiple sources who have indicated that the investigation could be initiated in a matter of weeks, and that US officials recently visited The Hague to discuss the matter further.

In its 2015 [Report on Preliminary Examination Activities](#), the ICC Office of the Prosecutor ("OTP") indicated that it is examining a number of aspects of the situation in Afghanistan, including alleged abuses of detainees by US forces between 2003 and 2005, offences committed by anti-government groups and Afghan government forces, and the alleged crimes committed in Kunduz between September and October 2015, including the bombing of the *Médecins Sans Frontières* hospital. If the

OTP opens a formal investigation, it will of course be into the situation in Afghanistan in general, and the specific cases will not emerge until much later in the process. Opening an investigation is only the first step in what is certain to be a long process before anyone is prosecuted by the Court - and the path to prosecutions, particularly of US citizens, is strewn with obstacles.

As Bosco points out in his article, the OTP faces a number of hurdles before it could

charge US citizens with any of the alleged crimes. Since the situation in Afghanistan was not referred to the Court by a State Party, the OTP will need judicial approval to launch an investigation. It will also need to gather sufficient evidence to establish a link between the conflict in Afghanistan and US detention policies, and most critically, in order for the case to be admissible under Article 17(1) of the Rome Statute, the OTP will need to demonstrate that the US are unwilling or unable to investigate or prosecute the alleged crimes.

Former US War Crimes ambassador Stephen Rapp elaborated on the issue of admissibility, and more specifically complementarity, during a recent conference (his comments were shared by Bosco in a subsequent [post](#)). Interestingly, Rapp made short shrift of the argument that the ICC should not have jurisdiction over crimes committed by citizens of non-States Parties - in his words, “[t]he ICC has territorial jurisdiction, full stop”. In Rapp’s view, the more convincing argument from the US perspective is based on complementarity - that the US has genuinely investigated the situation, and crucially in the OTP’s view, that it has pursued “those most responsible for the most serious crimes”. Rapp’s conclusion is hard to argue with, if the US can show that it has genuinely investigated and prosecuted those responsible for the alleged crimes then the OTP’s case against any US citizens will be over before it’s even begun. Rapp also commented on the scale and severity of the alleged crimes committed during US “enhanced interrogations”, stating that they pale in comparison to

situations in previous international cases. Kevin Jon Heller shared his cogent observations on this issue in a [post](#) responding to Rapp, emphasising the “critical difference between situational gravity and case gravity”. Heller notes that while Rapp is correct that the US conduct alone would probably not justify a formal investigation, Bosco reported that that OTP will open an investigation into the situation in Afghanistan as a whole, so any alleged crimes committed by the US would be only one case in the overall situation. With that in mind, the argument that the scale of US conduct is insufficiently grave becomes far less convincing - as Heller points out, the OTP has pursued individual cases that are similarly, or even more, limited, most notably the recent [Al Mahdi](#) case for destruction of cultural property.

Issues of public perception and legitimacy have plagued the ICC since its inception, and have certainly not been helped in recent weeks by Burundi, South Africa, and Bensouda’s native Gambia, filing to leave the Court. So how exactly will a high-profile investigation into a controversial war impact the Court’s injured reputation? At the very least, a headline-grabbing investigation into US conduct is sure to go some way to dispelling the public impression that the ICC is biased in favour of Western powers. That said, any public goodwill is likely to be quickly overshadowed by the scale of the task facing the Prosecutor in pursuing an investigation which will be rife with practical and political challenges that will push the OTP’s capabilities to the limit. Each aspect of the investigation, which looks set to encompass insurgent groups, the Afghan

government, and international forces, presents unique challenges. As Bosco reports, there will be issues with attempting to assign individual criminal responsibility to insurgent forces. Another potential problem arises from the fact that the Afghan government has used amnesties to broker peace in the country; an issue which has also emerged and is yet to be resolved by the Court in the [Saif al-Islam Gaddafi](#) case. This, along with the expected scrutiny into the conduct of Afghan forces might result in the Afghan government being less than willing to cooperate with visiting ICC personnel. With the announcement that an investigation will be initiated in a matter of weeks, the only certainty for now is that anyone with even a passing interest in international criminal law will be watching this story closely.

Blog Updates and Online Lectures

Blog Updates

Africa in the Dock: On ICC Bias, by Tor Krever. Blog is available [here](#)

Laws of War: Humanitarian Stallion or Trojan Horse? by Jonathan Horowitz. Blog is available [here](#)

Human Rights Obligations of Non-State Armed Groups, by Daragh Murray. Blog is available [here](#)

Publications and Articles

Books

M. Cherif Bassiouni and William A. Schabas (2016), **The Legislative History of the International Criminal Court (2 vols.)**, Brill

J. David Ohlin and L. May (2016), **Necessity in International Law**, Oxford University Press

M. Sterio (2016), **Prosecuting Juvenile Piracy Suspects**, Routledge

M. Aksenova (2016), **Complicity in International Criminal Law**, Hart Publishing

Online Lectures and Videos

Justice series: What's the right thing to do? A Harvard course by Prof. Michael Sandel. For more information, click [here](#)

Criminal Strategy. An Oxford lecture by James Cockayne. For more information, click [here](#)

International Cooperation - International Extradition law. A lecture by Ivan Shearer, Professor of law at the University of Sydney. For more information, click [here](#)

Articles

C. Heyns, D. Akande, L. Hill-Cawthorne, & T. Chengeta, **"The International Law Framework Regulating the Use of Armed Drones"** (2016) *International and Comparative Law Quarterly* 65(4), pp. 791-827

N. Perova, **"Stretching the Joint Criminal Enterprise Doctrine to the Extreme: When Culpability and Liability Do Not Match"** (2016) *International Criminal Law Review* 16(5), pp. 761-795

N. Kumar Katyal and T.P. Schmidt, **"Active Avoidance: The Modern Supreme Court and Legal Change"** (2016) *Harvard Law Review* Volume 128, p.2109

Calls for Papers

PluriCourts and **iCourts** have issued a call for papers for a workshop entitled **Gender on the International Bench**, on 23-24 March 2017. Deadline for abstract: 20 January 2017. For more information, click [here](#)

The **ICTY** has called for papers for **June 2017 Legacy Conference** on a range of issues. Deadline for abstract: 15 December 2016. For more information, click [here](#)

Events

Quitting the ICC: A roundtable discussion

Date: 11 November 2016

Location: TMC Asser Institute, The Hague

For more information click [here](#)

IGNITE 2016: Tackling Instability, Radicalisation and Forced Migration

Date: 16 November 2015

Location: Beurs van Berlage, Amsterdam

For more information click [here](#)

Distinguished Speaker Series: General Tom Middendorp, Chief of Defense of The Netherlands

Date: 23 November 2016

Location: The Hague Institute for Global Justice, The Hague

For more information click [here](#)

ADC-ICTY Annual Conference

Date: 3 December 2016

Location: Marriot Hotel, The Hague

For more information click [here](#)

Opportunities

Associate Legal Officer (P-2), New York

Office of Human Resources Management

Deadline: 17 November 2016

For more information, click [here](#)

Case Management Coordinator, The Hague

Office of the Prosecutor, ICC

Deadline: 20 November 2016

For more information, click [here](#)

Crime Prevention and Criminal Justice Officer, Vienna

Office on Drugs and Crime

Deadline: 24 November 2016

For more information, click [here](#)

Associate Legal Officer, Phnom Penh

Trial Chamber, ECCC

Deadline: 1 December 2016

For more information, click [here](#)

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