ADC-ICT ANNUAL CONFERENCE 2017

ADC-ICT NEWSLETTER

23 December 2017

ISSUE 118

FOLLOW US...

Head of Office: Dominic Kennedy

Assistant: Görkem Türer

Contributors: Maraya Fata, Eva Jerman, Aldrich Kelly, Anastasiia Tatarenko & Jelena Trifunović

ADC-ICT News

ADC-ICT Annual Conference 2017

On 9 December 2017, the ADC-ICT held its Annual Conference in The Hague. The title of this year's conference was 'International Crimes: Past, Present and Future Perspectives'. The Conference was attended by over 200 participants and included contributions from practitioners from the international courts and tribunals as well as academics. The Keynote Address was given by Dr. Fidelma Donlon, Registrar of the Kosovo Specialist Chambers. Dr. Donlon highlighted the importance of the defence function at the international courts and gave an update with regards to the Kosovo Specialist Chambers which is the newest court to be located in The Hague.

Eduardo Toledo, a Senior Legal Officer at the International Nuremberg Principles Academy, was the first speaker on Panel I. He presented on the Legacy of the Nuremberg Trials including the 'Industrialists Trials'.

Firstly, he explored how the Prosecution at Nuremberg identified the role played by some corporations in establishing Germany's regime of persecution. Driven by public policy, as well as financial gain,

Contents

Krupp, Flick and IG Farben were some of the most notorious industries put on trial for their contribution to the war. However, it was only decades later, at the Lebanon Tribunal, that corporate criminal liability was established. Despite this development, it is not included in the Rome Statute due to a lack of state practice and consensus.

He asked 'what lessons were learned from the past?' Perhaps that economic objectives and sheer greed on the part of large corporations can lead to the commission of international crimes, but more importantly, according to Toledo, that there is a need to recognise this and create a system which uses international criminal law as the tool to protect the rights of those affected and deter other perpetrators.

The second panellist, Najwa Nabti, a Legal Officer at Office of the Prosecutor, MICT and ICTY, presented on the legacy of the prosecution of sexual and gender based crimes before the ICTY.

One of the issues she identified was that victims of sexual violence can be easily overlooked when it comes to the larger conflict surrounding them. This was perhaps the case at Nuremberg, where the Charter did not expressly refer to sexual violence and where few of those testifying were women. Regardless of this, the victims received a voice, if not justice.

The legacy of the ICTY was therefore the prominence which it gave to such crimes, albeit the only codified crime being that of rape as a crime against humanity. The Tribunal's work thus paved the way for the ICC, which has further developed and broadened sexual violence and gender based crimes.

The third and final panellist on the first Panel, Christopher Gosnell, ICTR, ICTY and ICC Defence Counsel, spoke about The ICTR's legacy relating to the definition of the elements of genocide.

Gosnell began with a quick overview of the Genocide Convection, as interpreted by the ICJ in the Bosnia Genocide Case, and how it imposes a duty of due diligence on States parties to punish and prevent it, even extra-territorially.

He then turned to consider the ICTR's Statute, and its interpretation of the *actus reus*, which can be defined in rather broad terms, and the *mens rea*, not only more limited but also requiring a 'special', genocidal intent. Most importantly, he concluded by noting that the ICTR's main legacy would be to find that it is possible for individuals to be judged and convicted in their individual capacity for this crime.

The second panel focused on the current developments relating to the core crimes at the International Criminal Court, the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon, and the Mechanism for International Criminal Tribunals.

The first panelist, Michael G. Karnavas, International Co-Counsel for Meas Muth in Case 003 at the ECCC, discussed the meaning of "civilian" in light of recent ECCC jurisprudence. Karnavas explained that most recently, the Co-Investigating Judge Michael Bohlander, who is currently investigating Cases 003 and 004, invited submissions from the parties and *amici curiae* on the issue of whether, under customary international law between 1975 and 1979 (ECCC's temporal jurisdiction), an attack against a state's own armed forces amounted to an attack against a civilian population for crimes against humanity. This issue became important in Cases 003 and 004 because some of the facts concern the alleged internal military purges, i.e. attacks against the Khmer Rouge own army.

Karnavas explained that the International Co-Prosecutor and *amici* (except for Prof. Joanna Nicholson, who took a neutral position) argued that the International Humanitarian Law (IHL) principle of distinction cannot apply to a state's own forces when there is no armed conflict, and that crimes against humanity were intended to protect all state's nationals. Karnavas opined that many *amici* failed to address the specific issue (what was the law in 1975-1979), arguing instead what the law should be in present times. The defence teams argued that the distinction between soldiers and civilians remains at all times (during an armed conflict and in peacetime), and that a state's attack against own soldiers must be dealt under national law, or prosecuted as genocide or a war crime, depending on the circumstances.

As Karnavas discussed, Judge Bohlander held that under the law of crimes against humanity between 1975 and 1979, an attack against a state's own armed forces amounted to an attack against a civilian

population, unless the forces were allied or providing military support to the enemy in an armed conflict. Judge Bohlander reasoned that while the predominant approach to the interpretation of civilian population is based on the IHL principle of distinction, considering the purpose of crimes against humanity and the specific scenario at issue (an attack against own soldiers in peacetime), it is more appropriate to interpret civilian population based on the specific situation of the victims at the time when the crimes were committed.

Karnavas observed that the issue is not settled, since it has not been addressed by the Pre-Trial, Trial, and Supreme Court Chambers of the ECCC. In conclusion, Karnavas suggested that to solve the conundrum, future definitions of crimes against humanity could omit the reference to a "civilian" population and replace the term with simply "population."

The next speaker was Shkelsen Zeneli, Legal Officer from the ICC Office of the Prosecutor. He spoke about forced marriage as a crime against humanity at the ICC. The crime of forced marriage is part of the ongoing case against Dominic Ongwen at the ICC. He highlighted that forced marriage is not considered a sexual crime. The victims of forced marriage suffer additional harm to those of sexual slavery. Distinct from the sexual nature, the crime violates the right to individual right to marry and establish a family. He stated that forced marriage changes the status of the victim, in the way they perceive themselves and how others perceive them. The Chamber held that the central element of forced marriage is the imposition of marriage on the victim, this is an element which is separate from any other crime charged in the Ongwen case.

The next panellist was Peter Haynes QC, Victims Counsel at the STL and former ICTY and ICC Defence Counsel who spoke about the definition of terrorism at the STL. Haynes highlighted the elements of the crime of terrorism which had been established at the STL including the specific intent to cause terror. He explained that the STL had used Lebanese law which different from customary international law on the definition of terrorism. He concluded that the crime of terrorism may be an unnecessary complication at the STL and the ordinary crime of murder could have been sufficient without the need to charge terrorism as a separate crime.

The final panellist on Panel 2 was Kate Gibson who has been Defence Counsel at the ICTR, SCSL, ICC and MICT. She presented on genocide by inference which forms part of the appeal in the Karadžić case at the MICT.

She explained that after the Karadžić trial judgement there was a lot of commentary on the conviction for genocide at Srebrenica. She asserted that this was the case as it was the first time that an ICTY Trial Chamber had inferred intention for genocide. She stated that the Prosecution's case was based on largely circumstantial evidence. She mentioned that the main evidence the Trial Chamber used was written notes of a conversation between Karadžić and Deronjić in which they spoke about 'moving goods'. The Trial Chamber used the sole evidence of Momir Nikolić who testified about a conversation he had heard but he was not present for the conversation. The Trial Chamber had relied on Nikolić's uncorroborated hearsay evidence to show Karadžić had knowledge. The Trial Chamber further then inferred Karadžić's intention for genocide. This has led to many commentators to assert that the conviction for genocide is not safe due to the Trial Chamber's heavy reliance on inference.

The final panel began with a presentation from Mathias Holvoet who spoke about the potential prosecution of organ trafficking as international crimes at the Kosovo Specialist Chambers and Specialist Prosecutor's Office. He stated that the Kosovo Specialist Chambers has material jurisdiction of the crime of organ trafficking under (1) the domestic criminal law of Kosovo, (2) transnational criminal law instruments and (3) core crimes under international criminal law. The Kosovo Specialist Chambers has temporal jurisdiction for acts committed between 1998-1999. Holvoet stated that is problematic because the Criminal Code of Kosovo was only adopted in April 2012, this clashes with the principle of non-retroactivity. Moreover, Kosovo domestic law lacks a definition of organ trafficking.

He mentioned that contention exists on whether 'trafficking of human beings with the purpose of organ removal' (THBOR) fits within the framework of international criminal law, arguably involving organised crime and economic motivation rather than political. However, the elements of the

crime should be assessed independently to ascertain whether these acts constitute either crimes against humanity or war crimes.

He said that THBOR could be prosecuted as crimes against humanity such as 'enslavement' under Art. 13(c) Law on Kosovo Specialist Chambers; alternatively, Art. 13(j) as 'other inhumane acts'. In the *Kunarac case at the ICTY*, the Court extended the scope of enslavement to encompass modern forms of slavery, such as human trafficking. Moreover, the practice of organ trafficking could be qualified as human trafficking under the Trafficking Protocol to the UN Convention against Transnational Organized Crime, the Draft Council of Europe Convention against Trafficking in Human Organs, and individually as the crime against humanity of enslavement, which do not require the withdrawal of organs. THBOR constitutes a prototypical example of enslavement because perpetrators seize control over the victims and own them as a thing or commodity. Alternatively, it should not be difficult to argue the required elements for 'other inhumane acts'.

Holvoet stated that the Marty and SITF Reports suggested that these crimes occurred mainly after 1999, thus after the armed conflict. Therefore, the Kosovo Specialist Chambers would lack temporal jurisdiction, the nexus requirement to the armed conflict. However, prosecutions as war crimes would still be possible if (1) investigations reveal that crimes against wartime detainees during the armed conflict involved organ trafficking or (2) if investigations establish organ trafficking victims after the armed conflict were also detained during armed conflict.

Just days before the activation decision in New York for ICC jurisdiction over the crime of aggression, Dr. Meagan Wong touched upon the core question: *In the absence of a UN Security Council referral, who would be subject to the jurisdiction of the ICC regarding crime of aggression?*

Dr Wong stated that a referral by the UN Security Council is straightforward. There is no need to determine whether the act of aggression occurred, the UN Security Council need only to refer the case and the Prosecutor would initiate investigations.

However, she stated that in the absence of UN Security Council referral, the conditions for the Court to exercise jurisdiction is either by State referrals or *proprio motu* investigations. Pursuant to Art. 15 *bis* of the Kampala Amendments, the ICC does not have jurisdiction over nationals of Non-State Parties or when the crime occurred on the territory of a Non-State Party.

Dr Wong said there are two trains of thought: (1) consent requires exclusive ratification by State or (2) where consent is implied unless a State opts-out by declaration. She argued that implied consent with the option to opt-out is consistent with Art. 12(1) Rome Statute and Art. 5(2) as *'lex specialis'* giving States Parties the legal basis to create this regime.

Moreover, she emphasised that as long as one of the parties to the proceedings, either the alleged aggressor State or the intended victim State, has ratified the Kampala Amendment and the alleged aggressor State has not opted out, the court may exercise jurisdiction regarding crimes of aggression.

She said that this may lead to disputes on the judicial competence of the ICC. The dispute settlement clause under Art. 119 Rome Statute offers several options. First, the Court may settle the dispute by a decision, negotiations between the State Parties, or Assembly of States Parties either to settle the dispute or by referral to the International Court of Justice.

The next panellist was Catherine Marchi-Uhel, Head of the International, Impartial and Independent Mechanism for Syria (IIIM). She stated that **s**ince violence erupted in the Syrian Arab Republic in March 2011, it descended into an armed conflict. Many entities such as States, Commission of Inquiry on Syria, or the OPCW Fact-Finding Panel formed a joint investigative mechanism. They identified violations of human rights, international humanitarian law and international crimes such as war crimes, crimes against humanity and genocide. Syrian and international NGOs were the first respondents to document the atrocities, mainly due to the difficult situation and access to the territory. Many of these atrocities remain unpunished. The flagrant impunity continues due to lack of political consensus within the UN Security Council to refer the Syrian situation to the ICC. In contrast, national authorities had already initiated a number of proceedings.

The UN General Assembly created the IIIM as an accountability mechanism with the adoption of Resolution 71/248 on 12 December 2016. The mandate of the IIIM is to assist in the investigation and prosecution of the crimes in two different ways: (1) collect information for evidence and (2) share this information with the courts or tribunals which have jurisdiction over these crimes.

Marchi-Uhel stated that the IIIM is not a Prosecutor's Office, their goal is more being a body which encompasses both prosecution and defence skills with a view of what a future court could do. Inculpatory and exculpatory material is collected with consideration given to remaining impartial and independent.

She said there is an absence of an international tribunal with jurisdiction to deal with the Syrian situation. One of the challenges is not knowing to which court the files will go. The immediate action is to engage constructively with national prosecution and other entities assisting with tools and expertise to ensure all necessary information is collected.

Another challenge Marchi-Uhel mentioned is the documentation, she stated that videos alone have totaled nearly a million. The material is reviewed to identify fake and fabricated material and with the expertise and cooperation of other organisations, the mass data is being cataloged to effectively capture the realities of these atrocities.

The IIIM is in between what national authorities are already doing and a possible future case on an international level. The IIIM has the prospect of delivering a real opportunity of accountability for the crimes committed in Syria.

The final panellist of the day was Dr. Yvonne McDermott Rees who spoke about the future of judicial law making in international criminal law. She stated that judges, regardless of restrictions, will be involved in law-making either procedurally or substantially. The ICC statutory framework limits this through a cumbersome process. Suggestions of judges are further deliberated and approved by State Parties. Moreover, she said that the ICC Chambers Practice Manual sets out strict limitations on how judges should provide reasoning in confirmation decisions. Different Chambers adopt contrasting adherence to the Manual.

She mentioned that in the *Ongwen* case, the Defence appealed the Confirmation Decision based on unclear reasoning. Judge de Brichambaut's dissenting opinion similarly expressed that the Pre-Confirmation Brief, intended to provide reasoning, was seriously deficient. The Appeals Chamber responded by declaring that the Decision was sufficiently reasoned because in their opinion as the Chamber which issued the decision believes it to be sufficiently reasoned. Dr. McDermott Rees asserted that this was a completely circular argument and there is no reference to why it is sufficiently reasoned or why the evidence is clearly linked to the charges.

In the Al *Mahdi* case, Judge Kovács dissented that "it is impossible to expect that the Chambers Practice Manual overrides the Statute and rules".

She mentioned that in the *Ntaganda* case, the distinction between judicial creativity and creative writing becomes blurry. The Trial Chamber when phrasing slavery as '*jus cogens*' law, made reference to the Barcelona Traction case from 1970, which says nothing about '*jus cogens*'. Contrarily, they only relate to '*erga omnes*' norms, the International Court of Justice only recognized '*jus cogens*' more than a decade after.

She said that the ICC Chambers Practice Manual constricts judges from procedural law-making, it is almost impossible to separate judges from such activities. Alternatively, judges fiercely protect their right to amend the rules and procedures by deviating from the non-binding Manual. This perspective may be favoured compared to simply pointing at a gap and hoping that States, who are the law-makers of international law, subsequently address this.

The Conference concluded with thanks from Branko Lukić, President of the ADC-ICT.

ADC-ICT Elections 2017

On Saturday 9 December, the ADC-ICT held its General Assembly which was attended by around 30 members. A number of items were discussed, and elections took place for the members of the committees for the coming year. Ms. Colleen Rohan was elected as President of the Association. The full results of the elections are available on the Governance pages of the website which are available here.

ICTY News

Prosecutor v. Mladić (IT-09-92)

On the 22 November 2017, the Trial Chamber delivered its Judgment in the Prosecutor v. Ratko Mladić case.

Mladić was the Commander of the VRS, the Main Staff of the Army of the Bosnian-Serb Republic between 12 May 1992 and 30 November 1995. He stood trial for 11 counts allegedly committed in this capacity in the areas of Sarajevo, Srebrenica, and 15 municipalities in Bosnia-Herzegovina. He was acquitted of 1 Count of genocide, and convicted as a member of various joint criminal enterprises (JCE), of 1 Count of genocide, 5 Counts of crimes against humanity, namely persecution, extermination, murder, deportation, and the inhumane act of forcible transfer, as well as 4 Counts of violations of the laws and customs of war, namely murder, terror, unlawful attacks on civilians, and taking of hostages. The mitigating factors put forth by the Defence were found to carry little or no weight, and subsequently he was sentenced to life imprisonment.

First, with regards to Count 1, the Chamber could not definitively conclude that the required intent to destroy a substantial part of the protected group of Bosnian Muslims was possessed by the physical perpetrators of the crimes in question. It therefore acquitted Mladić of this Count. Judge Orie delivered a Dissenting Opinion.

Second, the Chamber found that Mladić was part of a JCE with the aim of creating a Serbian state void of Muslims and Croats. In order to achieve this, he led a campaign of ethnic cleansing, which resulted in the commission of the crimes against humanity specified above. The Trial Chamber held that the Bosnian-Serb forces perpetrated murder on a large scale, which, in some instances, was found to constitute extermination. Additionally, many civilians were unlawfully detained and subjected to inhumane treatment on the basis of political, racial or religious grounds.

Third, Mladić was found to have participated in JCE targeting the civilian population in Sarajevo by a sniping and shelling campaign. The Chamber concluded that the main purpose for this was to spread terror among the civilian population, a violation of the laws and customs of war.

Fourth, a JCE with the objective of eliminating Bosnian Muslims in Srebrenica was found to have existed. The Chamber concluded that Mladić had used those in his command to execute Bosnian Muslim men and boys from Srebrenica, as well as to forcibly remove the women and children from the area. In the pursuit of this objective, genocide, persecution, extermination, murder, the inhumane act of forcible transfer and deportation, the Trial Chamber found that these were committed in Srebrenica.

Finally, the Chamber found that Mladić participated in a JCE aimed at capturing and detaining UN personnel at strategic locations to prevent further NATO air strikes on the Bosnian-Serb forces. This taking of hostages constituted a violation of the laws and customs of war. Other members comprising the JCE were found to have been the VRS Main Staff; the VRS Corps Commands; Radovan Karadžić; and Nikola Koljević.

Prior to the delivery of judgement, the Defence had asked that proceedings be postponed due to Mladić's health. The Trial Chamber denied the request. During the delivery of the judgement, Mladić had his blood pressure taken after reporting that he did not feel well. His blood pressure was reported to be 180/80, the judges proceeded with the delivery of the judgement and removed Mladić from the courtroom.

In a subsequent press release, Prosecutor Serge Brammertz stated that his Office "...will review the Trial Chamber's reasoning" regarding Mladić's acquittal of Count 1, while his Defence Team assured the media that Mladić will launch an appeal against the Chamber's findings.

The full judgement is available here.

RATKO MLADIĆ

Prosecutor v. Prlić et al (IT-04-74)

On 29 November 2017, the Appeals Chamber rendered its judgement in the Prlić *et al* case. This was the final judgement of the ICTY after its 24 years of existence.

The Appeals Chamber confirmed key findings from the Trial Chamber judgement including that an international armed conflict existed across the territory of BiH because of Croatia's involvement. The Appeals Chamber found that Croatia 'held effective power in come municipalities through the HVO'.

The Appeals Chamber held, Judge Pocar dissenting, that the destruction of the Old Bridge in Mostar was used for military purposes and that its destruction could not be qualified as large-scale destruction not justified by military necessity, or as persecution and terrorizing of civilians. The Trial Chamber had previously held that the destruction of the Old Bridge achieved a psychological effect on Muslims in Mostar and its destruction was disproportionate. The Appeals Chamber reversed a number of findings and also granted the Prosecution's appeal ground that there was a JCE under the third category for crimes which were a natural and foreseeable consequence of the accused's actions. The Appeals Chamber, however, refused to enter new convictions or order a retrial citing the length the proceedings had already taken.

The Appeals Chamber confirmed the sentences of all the accused.

After the confirmation of his sentence, Slobodan Praljak stated that he was not a war criminal and drank a liquid from a small glass bottle. Subsequently he fell ill and died later in hospital. It has since been confirmed that he drank potassium cyanide and an investigation into the unfortunate incident is ongoing.

The full judgement is available here.

MICT News

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

In the week of 6 November, the trial continued with the testimony of an ex-member of the Scorpions paramilitaries, Goran Stoparic. The witness stated that the Scorpions paramilitary unit and Arkan's Serbian Volunteer Guard were both under the authority of Serbian State Security Service, which the Simatović Defence claimed to be inaccurate by presenting evidence which showed that the two mentioned paramilitary units were rather under the authority of the Bosnian Serb Army and of the armed forces of Republic of Serbian Krajina. The witness acknowledged their claims to be formally true but stated that in reality it appeared to be different.

The case proceeded with the testimony of an expert witness Dr. Christian Nielsen.

Dr. Nielsen is a Professor of Southeast European Studies and Bosnian/Serbian/Croatian at the University of Arhus, Denmark and a former employee of the ICTY OTP. His testimony mostly included his analysis of the documents regarding the work of the Serbian State Security Service during the 1990s. Dr. Nielsen was another Prosecution witness, who was supposed to give evidence on connection between the Serbian State Security Service and Zeljko Raznatovic. In regard to that, he answered to a question posed by the Stanišić Defence that he had never claimed a direct connection between the concerned parties at that time but stated that the Serbian State Security Service's documents indicated its awareness of Arkan's Serbian Volunteer Guard.

In the week of 27 November, the Trial Chamber heard evidence from expert witness Dr. Davor Strinovic. The Croatian pathologist testified about the content of his expert report on the examination of human remains found in Croatian mass graves. One of the issues which arose during the cross-examination by the Simatović Defence was the questionable legal status of the victims which were classified as civilians in his report but found to be included in the Registry of Croatian Homeland War Defenders. According to the Simatović Defence counsel Mihajlo Bakrac, there were 30 such examples for which Dr. Strinovic could not provide any reasonable explanation.

International Criminal Court

Rebecca Campbell, Legal Intern in the Office of Public Counsel for the Defence
The views expressed herein are those of the author alone and do not reflect the views of the ICC.

The Appeals Chamber in the *Bemba* case focuses questions on the contextual elements of crimes against humanity

On 21 March 2016, Jean-Pierre Bemba Gombo was convicted of crimes allegedly committed in the Central African Republic from 2002 to 2003, including the crimes against humanity ("CAH") of rape and murder. It was alleged that he had effective control over the Mouvement de Libération du Congo (MLC) forces that committed the crimes.

Mr Bemba appealed the conviction (ICC-01/05-01/08-3434-Red), arguing, among other things, that the Trial Chamber failed to establish the necessary contextual elements of crimes against humanity.

On 31 October and 27 November 2017, the Appeals Chamber requested that the parties provide further submissions on these contextual elements (ICC-01/05-01/08-3564 and ICC-01/05-01/08-3579).

The development of CAH

The contextual requirements of CAH have developed differently at the various international courts. At Nuremberg, CAH included murder, enslavement or deportation (although not rape) "committed against any civilian population".

At the ICTY, CAH included any of the inhumane acts listed in Article 5 of its Statute (which included rape), when directed against any civilian population and "when committed in [international or internal] armed conflict". This armed conflict requirement is unique to the ICTY.

The ICTR used the same formulation as the ICTY, however the armed conflict requirement was replaced with a requirement that the crimes were based "on national, political, ethnic, racial or religious grounds". This discriminatory element is unique to the ICTR.

In 1998, the State representatives at the Rome Conference created Article 7 of the Rome Statute, which defines CAH at the ICC. They considered the different approaches of previous Tribunals, but ultimately rejected the requirements of armed conflict and discrimination, to ensure the ICC formulation of CAH could be applied to any potential future conflict.

To distinguish CAH from ordinary crimes, the drafters included the requirement that CAH must form part of a widespread or systematic attack. Some argued that this disjunctive test would be overly inclusive.

To prevent this, Article 7(2)(a) spells out that an "attack directed against any civilian population" means "a course of conduct involving the multiple commission of [certain crimes] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack".

Consequently, under Article 7 at the ICC, conduct amounts to CAH when it involves any of the acts listed in Article 7 "when committed as part of a widespread or systematic attack against any civilian population, with knowledge of the attack".

The knowledge requirement, which was implicit at previous courts such as the ICTY and SCSL, was made explicit at the ICC.

The issue of interpreting Article 7(2)(a) arose in the *Kenya* situation, in which Pre-Trial Chamber II examined whether the organization connected to the 'policy' had to be 'state-like'. The Majority found it did not, with Judge Kaul dissenting (ICC-01/09-19-Corr and ICC-01/09-01/11-373).

The findings on CAH contextual elements in *Bemba*

In the Trial Judgment (ICC-01/05-01/08-3343), the Chamber was satisfied that there was an attack against a civilian population, as required by Article 7(2)(a). It further found, on the basis of the number of victims and its geographical scope, that the attack was widespread.

With regard to the policy, the Chamber found that the only reasonable inference to be drawn from the evidence was that the attack did occur in the context of an organizational policy, although no *formal* policy was established. The Chamber relied upon eight factors, which primarily concerned the manner in which the crimes were committed, including that the acts of rape and murder followed a *modus operandi* and that the attacks were committed over time and across a wide area in a recurrent pattern of violence. It found that it was not reasonable to suggest that the crimes were

the result of an uncoordinated and spontaneous decision of the perpetrators.

The Defence appealed this finding and challenged some of the evidential underpinnings of the eight factors.

The Appeals Chamber subsequently ordered that the parties provide further submissions on the contextual elements of CAH, specifically on the organizational policy. This included whether there was sufficient evidence to prove an organizational policy, what the organizational policy was, and whether an organizational policy can be inferred from the manner in which the crimes were committed.

The Defence filed its additional submissions on 13 November (ICC-01/05-01/08-3573). They argue that the Trial Chamber did not have sufficient basis for its finding that there was an organizational policy, because it failed to establish a nexus between any organizational policy and attack; the supposed organizational policy was never defined; and because the manner in which crimes were committed may *support* an inference of an organizational policy, but cannot *alone* allow for such an inference.

The Prosecution filed its additional submissions on 27 November (ICC-01/05-01/08-3578-Red), arguing, among other things, that the ICC has followed a 'modest' approach to organizational policy, requiring only 'a collective dimension', in order to screen out 'ordinary' crime. They argue a policy may indeed be inferred from the manner in which crimes were committed, including deliberate inaction, and therefore the 'inadequate and insincere' measures taken by the MLC to address the crimes committed against the civilian population are sufficient to establish a policy.

The representative for victims also filed their response on 4 December (ICC-01/05-01/08-3582), presenting arguments that, in some respects, concur with those of the Prosecution. The Appeals Chamber has ordered the parties to further address these and other issues in the Appeal Hearing, which will take place 9 to 12 January, and 16 January 2018.

Developments in this area are important because they will define the contours of CAH at the ICC, clarifying what separates them from domestic crimes. A broadening or a narrowing of the way it is understood could rule persons, crimes and even situations into – or out of – the realm of the ICC's jurisdiction.

Extraordinary Chambers in the Courts of Cambodia

Mathilde Cayol and Sarah Reilly, Ao An Defence Team

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

Case 002

NUON Chea

During the months of October and November, the Nuon Chea Defence Team carried out ongoing research and analysis work on Case 002/02 while awaiting receipt of that trial judgement.

KHIEU Samphân

In October, the KHIEU Samphân Defence team filed its amended closing brief in Case 002/02 following the transcript review process by the Transcription Unit. The Defence then reviewed the amended briefs filed by the other parties.

In November 2017, the KHIEU Samphân Defence team was engaged in the preparation of the future appeal in Case 002/02.

Case 003

MEAS Muth

The Meas Muth Defence filed several submissions to the Office of the Co-Investigating Judges and the Pre-Trial Chamber, which have been classified as confidential. The Defence continues to review material on the Case File and to prepare submissions to protect Meas Muth's fair trial rights and interests.

Case 004

IM Chaem

In October, the Defence filed a confidential submission to the Pre-Trial Chamber and prepared its Response to the Civil Party Co-Lawyers' Submission on ECCC Position within the Cambodian Legal System.

In November, the Defence has been preparing for the hearings before the Pre-Trial Chamber concerning the International Co-Prosecutor's Appeal against the Closing Order (Reasons). Further, the Defence filed a confidential letter to the Pre-Trial Chamber relating to the hearings and its

Response to the Civil Party Co-Lawyers' Submission on ECCC Position within the Cambodian Legal System.

The Defence endeavours to safeguard Ms. IM Chaem's fair trial rights and interests throughout the remaining proceedings of the pre-trial stage of Case 004/1.

AO An

In October, the AO An Defence team filed a 174-page Response to the Co-Prosecutors' Rule 66 Final Submissions. The team also issued a Statement on their Response to the Co-Prosecutors' Final Submission in both English and Khmer languages. Moreover, the Defence continued reviewing all materials on the Case File in order to safeguard Mr. AO An's fair trial rights in light of the impending closing order.

YIM Tith

In October and November, the YIM Tith Defence continued to analyse the content of the Case File in order to participate in the investigation, prepare Yim Tith's defence and endeavour to protect his fair trial rights.

ADC-ICT Annual Conference Photos

Below are photos of the panels from the ADC-ICT Annual Conference 2017, to view all the photos please visit the gallery page of the ADC-ICT website.

ICL News Round-up

ICC Prosecutor asks Security Council to act on outstanding arrest warrants, *UN News Center*

Omar Al Bashir recently travelled to countries that recognize the International Criminal Court (ICC) but none arrested or surrendered the Sudanese President, the ICC Prosecutor today told the United Nations Security Council. "I call on this Council to prioritise action on the outstanding warrants of arrest issued by the Court," Fatou Bensouda told the Security Council in New York. She also said... Read more.

'Mission accomplished,' president of UN tribunal for Former Yugoslavia tells Security Council, *UN News Center*

After more than 24 years of operations, the United Nations tribunal set up to prosecute crimes committed during conflicts in the Balkans in the 1990s, has now completed all judicial work, the court's President told the UN Security Council on Wednesday. "Despite all the sceptics, the naysayers, the deniers who, from the very beginning, embarked on a campaign against the Tribunal and have been at pains to question our legitimacy and integrity ... Read more.

Prosecution Challenges Vojislav Seselj's War Crimes Acquittal, *Balkan Transitional Justice*

The prosecution asked the UN court in The Hague to quash the acquittal of Serbian Radical Party leader Vojislav Seselj and convict him of war crimes in Bosnia and Herzegovina, Croatia and Serbia. Prosecutor Mathias Marcussen asked the judges at the Mechanism for International Tribunals in The Hague on Wednesday to overturn last year's acquittal and sentence Vojislav Seselj to 28 years in prison, or to order a retrial. "Justice is not served... If this verdict stands, it would not only be an insult to victims, but would undermine this court," Marcussen said. Seselj, the leader of the hardline nationalist Serbian Radical Party, who was freed for cancer treatment in 2014 and refused to return from Belgrade to attend the hearing, has asked for the appeal to be rejected and his acquittal confirmed.... Read more.

ICC prosecutor confirms decision not to investigate 2010 Israeli-Turkish conflict, *Jurist*

International Criminal Court (ICC) chief prosecutor, Fatou Bensouda confirmed Thursday that her office will not investigate [press release] a 2010 Israeli attack against a Gaza bound Turkish flotilla. After a presentation of new facts and information, Bensouda concluded that there was not "sufficient gravity" to support a legal action under the Rome statute]. Bensouda stated... Read more.

South Sudan: Global action needed to end human rights violations and humanitarian crisis, *Amnesty International*

Sustained international action is urgently needed to end the horrific human rights violations taking place in South Sudan, said Amnesty International today as the country's armed conflict entered its fifth year. Tens of thousands of people have been killed, thousands more subjected to sexual violence, and close to four million displaced since the conflict began on 15 December 2013. "Coordinated and sustained international action is needed now more than ever to end the suffering in South Sudan, especially as the rainy season ends and the dry season begins... Read more.

The Hague says claims of war crimes by UK troops have 'reasonable basis', *The Guardian*

International criminal court to press ahead with investigating allegations that British forces mistreated detainees in Iraq. The chief prosecutor at the international criminal court in The Hague, Fatou Bensouda, has declared there is a "reasonable basis" to believe that UK soldiers committed war crimes against detainees during the Iraq conflict. The announcement on Monday means the ICC will press ahead with its investigation into claims that British troops abused and unlawfully killed prisoners after the US-led invasion. It came in a 74-page report delivered in New York to the annual assembly of states parties that participate in the jurisdiction of the court. In her conclusion on the long-running inquiry into the role of British troops in Iraq between 2003 and 2008... Read more.

Sri Lanka must urgently implement reforms to end arbitrary detention, UN rights experts say, *OHCHR*

The UN Working Group on Arbitrary Detention has identified significant challenges to the enjoyment of the right to personal liberty in Sri Lanka, resulting in arbitrary detention across the country. The experts recognize positive initiatives, including engagement with UN human rights mechanisms, as well as the recent accession to the Optional Protocol to the Convention against Torture. However, they say further urgent action is required to give effect to Sri Lanka's obligations under international human rights law, as well as the commitments made by the Government in its Human Rights National Action Plan 2017-2021... Read more.

ICC announces referral of Jordan to Security Council over Bashir visit, *Jurist*

The International Criminal Court (ICC) on Monday announced that it will refer the Kingdom of Jordan to the United Nations Security Council over its failure to arrest Sudanese President Omar Al-Bashir. The referral comes after the ICC decided issued two arrest warrants for Al-Bashir for the alleged genocide, war crimes, and crimes against humanity committed in Darfur. However, because Sudan is not a part of the ICC, it is up to member nations to effect an arrest if the suspected individual is in their jurisdiction. The ICC is referring Jordan because they granted him immunity as a head of state and refused to arrest him when he visited in March for a summit... Read more.

Week in Review: ICC debates "crime of aggression" as Yemen suffers and Croatia denies, *Justiceinfo.net*

The International Criminal Court's annual meeting of 123 member countries started this week at the United Nations in New York. This year's Assembly of States Parties (ASP) is discussing, among other things, whether the "crime of aggression" will be added to the ICC's jurisdiction alongside war crimes, crimes against humanity and genocide. This debate is not just academic and legal. The "crime of aggression" -- i.e. one country aggressing another -- divides both ICC member and non-member States, because it could mean the indictment of State leaders in cases like Russia's war in Georgia and/or annexation of Crimea, and the United States', France's and Britain's intervention in Libya. Ugandan and Rwandan meddling in the Democratic Republic of Congo could also be the target of Court procedures, as well as the multiple interferences in Syria's war and the actions of Iran and Saudi Arabia in Yemen... Read more.

US Urges Serbia to Tackle Kosovo Massacre Cover-Up, *Balkan Transitional Justice*

The US State Department said that those responsible for moving the bodies of Kosovo Albanian civilians killed in the 1999 war to mass graves in Serbia should be brought to justice.The US State Department said on Tuesday that it has brought a report by the Belgrade-based Humanitarian Law Centre NGO about the cover-up of crimes in Kosovo to the attention of Serbia's recently-appointed war crimes prosecutor. "We believe

that those guilty of moving the bodies of Albanian civilians from Kosovo to clandestine mass graves in Serbia to conceal evidence of earlier massacres should be brought to justice," said Deputy Secretary of State John Sullivan, in a response to a question from US Representative Eliot L. Engel. Engel, who was among the first to have lobbied for Kosovo's independence, questioned the State Department about whether or not it has asked the government of Serbia how it will prosecute the perpetrators of the massacres, or whether some form of international tribunal will be necessary... Read more.

Security tensions may have deepened rights violations in DPRK, Security Council told, *UN News Center*

People's rights are reportedly violated in "almost every aspect" of their lives in the Democratic People's Republic of Korea (DPRK), the United Nations human rights chief warned Monday, stressing that security tensions on the Korean Peninsula should not negate concerns about the situation of ordinary people there. "I regret that it is impossible for me to point to any significant improvement in the human rights situation [...] Indeed, security tensions seem to have deepened the extremely serious human rights violations endured by the DPRK's 25 million people"... Read more.

Blog Updates and Online Lectures

Blog Updates

"ICC Judges Authorise Opening of an Investigation into the Situation in Burundi", by Julien Maton. Blog available here.

"Foreign Jurists in the Colombian Special Jurisdiction for Peace: A New Concept of Amicus Curiae?", by Kai Ambos and Susann Aboueldahab. Blog available here.

"Nobody's Land: Where All step but No One Settles", by Giulia Bernabei. Blog available here.

Online Lectures and Videos

"International Law In Action: Investigating and Prosecuting International Crimes", by Leiden University. Lecture available here.

"Rethinking the Role of Non-State Actors under International Law", by Andrew Clapham. Lecture available here.

"International Society and the Ideal of Justice", by Philip Allott. Lecture available here.

Publications and Articles

Books

Jens David Ohlin. (2017). **Theoretical Boundaries of Armed Conflict and Human Rights,** Cambridge University Press.

Stéphanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone. (2017). **Tracing the Roles of Soft Law in Human Rights,** Oxford University Press.

Charles Chernor Jalloh, and Ilias Bantekas. (2017). **The International Criminal Court and Africa,** Oxford University Press.

Nina Burri. (2015). **Bravery or Bravado? The Protection of News Providers in Armed Conflict,** Brill Nijhoff.

Articles

Hannah Woolaver, and Emma Palmer. (2017). **"Challenges to the Independence of the International Criminal Court from the Assembly of States Parties",** Journal of International Criminal Justice, Volume 15, Issue 4, pp. 641-665.

Shanee Stepakoff, Nicola Henry, Neneh Binta Barrie, and Adikalie S Kamara. (2017). **"A Trauma-Informed Approach to the Protection and Support of Witnesses in International Tribunals: Ten Guiding Principles",** Journal of Human Rights Practice, Volume 9, Issue 2, pp. 268-286.

Paschalis Paschalidis. (2017). **"Arbitral tribunals and preliminary references to the EU Court of Justice",** Arbitration International, Volume 33, Issue 4, pp. 663-685.

Calls for Papers

The ESIL Interest Group on International Legal Theory and Philosophy has issued a call for papers on **"Transcendent principles and pluralism in international law: the complex, the simple, and the universal".**

Deadline: 31 December 2017, for more information click here

The International Society of Public Law (ICON-S) and the Eötvös Loránd University (ELTE) Faculty of Law have issued a call for papers on **"Power of Public Law in the 21st Century".**

Deadline: 10 January 2018, for more information click here.

Events

Contemporary Constraints on the Waging of War: A Tribute to Prof. Frits Kalshoven

Date: 16 January 2018

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

For more information, click here.

Evidence and Proof in International Criminal Trials

Date: 18 January 2018

Location: The Public International Law Discussion Group at the University of Oxford, Oxford

For more information, click here.

The Rohingya Crisis: Past, Present and Future

Date: 23 January 2018

Location: Chatham House, London

For more information, click here.

Symposium I: "(Post-)Colonial Injustice and Legal Interventions"

Date: 27-28 January 2018

Location: Akademie der Kunste, Berlin

For more information, click here.

ICDL 12th Annual Meeting 2018

Date: 27 January 2018

Location: Hotel InterContinental Berlin, Berlin

For more information, click here.

Opportunities

Associate Human Rights Officer/Transitional Justice and Combating Impunity (P-2)

UN Organisation Stabilization Mission in the Democratic Republic of the Congo, Kinshasa

Deadline: 25 December 2017

For more information, click here.

Rule of Law Officer

Norwegian Refugee Council, Warsaw

Deadline: 10 January 2018

For more information, click here.

Legal Counsel

Amnesty International, London

Deadline: 7 January 2018

For more information, click here.

Immigration Paralegal

RKRS Legal, London

Deadline: 3 January 2018

For more information, click here.