



STANIŠIĆ AND SIMATOVIĆ



ISSUE 117

**Head of Office:** Dominic Kennedy**Assistants:** Nicholas Ortiz, Görkem Türer & Manon Verdiesen**Contributors:** Eva Jerman & Jelena Trifunović

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## MICT News

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

The case of Prosecutor v. Stanišić and Simatović resumed on 2 October 2017, with the testimony of the expert witness Prof. Jakub Bijak, taking the stand on 3 and 4 of October. Prof. Bijak teaches Statistical Demography at the Department of Social Statistics and Demography at the University of Southampton, UK. He testified about the ethnic composition of war affected areas in Croatia, prior to the outbreak of conflict in 1991. His analysis partly covered displacements of populations from the previously mentioned areas from 1991 to 1995 and showed the majority of them were non-Serbian. However, during the cross examination by Vladimir Petrović, Co-

Counsel for Simatović, Prof. Bijak admitted to not having access to databases of refugees registered in the former Yugoslavia.

The trial proceeded with the expert witness Višnja Bilić, who was testifying on the 4 and 5 October. Bilić is a psychology professor, currently employed by the Institute of the Missing Persons established by the Ministry of the Croatian Veterans. She testified about her research on missing persons from the war in Croatia in 1991. The accuracy of her report was put under question when Petrović brought to the attention of the

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Trial Chamber, that she wrongly categorised three missing persons as civilians, despite their personal information being found in the Registry of Croatian war veterans.

Witness RFJ-157, a Croat from village Klisa in the SBWS region, testified about events related to the deportation of five Croats, which took place in November 1991.

Witness RFJ-138 was a member of the kitchen staff in the Training Centre Erdut in the summer of 1991. Their statement included information on their daily interactions with some of the JCE members and their observations of the activities taking place at the Centre.

Witness RFJ-102, a non-Serb from Erdut,

Croatia, testified about the time when they were taken to the Training Centre in Erdut, which was occupied by Arkan and his soldiers.

In the week of 23 October there was a trial recess, and the proceedings continued in the week of 30 October, with witness RFJ - 022, giving their testimony in a closed session.

## Prosecutor v. Ngirabatware (MICT-12-29-R)

On 23 October 2017, the Registry received Dr. Ngirabatware's second motion for modification of conditions of detention until the review hearing. He requested that he be detained at a safe house in Arusha where those acquitted and having served their sentences reside, with such conditions as the President deems appropriate, or that he remain detained at the UN Detention Facility (UNDF), but be allowed to leave between 8 am and 7 pm each day, until the commencement of his review hearing. Previously, on 22 March 2017, the President denied Dr. Ngirabatware's motion for modification of conditions of detention, but invited him to renew his motion "should there be no material change in the circumstances that are currently giving rise to the ongoing delay in the Ngirabatware case by 9 June 2017". Those circumstances were the unlawful detention of Judge Aydin Sefa Akay by the government of Turkey.

On 22 June 2017, the President denied Dr. Ngirabatware's renewed motion for modification of conditions of detention, on the grounds that it was moot given that Judge Akay was released from detention and rejoined the Appeals Chamber, and given that the Appeals Chamber had granted Dr. Ngirabatware a review hearing.

However, the review hearing has not yet been held, and on 16 October 2017 Dr. Ngirabatware was notified that his transfer to a West African country to serve his sentence is planned.

Since there are similar cases to his case at the ICC, and the ICTY where the accused benefitted from the presumption of innocence, Dr. Ngirabatware claims that his Motion for Review of Judgement (8 July 2016) cannot be ignored. In the case of *Milutinovic et al.* at the ICTY, a Trial Chamber considered that where the accused had

already been in detention for three years, a further delay in the start of the trial was a factor to be weighed in favour of releasing the accused pending trial. Likewise in the case of *Bemba et al* at the ICC, the Trial Chamber held that release was appropriate after the suspects had been detained for eleven months while awaiting trial.

The motion remains pending before the President.



**AUGUSTIN  
NGIRABATWARE**

# ICL News Round-up

## **Hague Tribunal to Appoint Lawyer for Vojislav Seselj, *Balkan Transitional Justice***

The UN war crimes tribunal will appoint a legal representative to represent Serbian nationalist leader Vojislav Seselj at his upcoming appeal hearing because he has refused to return to the court. The Mechanism for International Criminal Tribunals in The Hague announced on Wednesday that it will appoint a legal representative to protect Serbian Radical Party leader's rights during his upcoming appeal hearing... [Read more.](#)

## **Myanmar: The forgotten war in Kachin State, *Justice info***

As the crisis in Rakhine grabs headlines, little attention is being paid to blocked aid deliveries, displacement and indiscriminate attacks on civilians in Myanmar's Kachin and northern Shan states. As displacement continues in northern Rakhine State, there is an urgent need for renewed international attention to consider and address broader, systemic conflict issues elsewhere in Myanmar... [Read more.](#)

## **European Court Rejects Bosniak Prisoners' Case Against Serbia, *Balkan Transitional Justice***

The European Court of Human Rights ruled that a complaint against Serbia by Bosniaks who were imprisoned in Serbian detention camps during the Bosnian war was inadmissible. The European Court of Human Rights has rejected a second complaint filed in the name of Bosniaks who were detained

and tortured in the Slijivovica and Mitrovo Polje camps in Serbia in 1995, the Belgrade-based Humanitarian Law Centre, which represented the families, said on Thursday... [Read more.](#)

## **Rwanda: The gruesome plight of children during the Tutsi genocide, *Justice info***

The Mechanism for International Criminal Tribunals (MICT) launched on October 4 an online exhibition giving insight on how children were affected by the Rwandan genocide and conflicts in former Yugoslavia in the 1990s. The exhibition, entitled "[Children in Conflict – Evidence from the Archives of the International Criminal Tribunals](#)", shows that children were often deliberately targeted for sexual violence, torture, persecution, forcible transfer, murder and extermination. To know more about how children were affected in Rwanda, JusticeInfo's Kigali correspondent spoke to Valérie Mukabayire, president of the Association of Genocide Widows (AVEGA –Agahozo)... [Read more.](#)

## **UN Prosecutor to Report Croatia to Security Council, *Balkan Transitional Justice***

The prosecutor at the UN war crimes court for the former Yugoslavia, Serge Brammertz, said he will report Croatia to the UN Security Council for non-cooperation with Bosnia and Herzegovina. Serge Brammertz said in [an interview with Croatian newspaper Novi List on Tuesday](#) that he will inform the UN Security Council that the Zagreb authorities are obstructing

cooperation between the Croatian judiciary and its counterpart in Bosnia and Herzegovina on war crimes cases, preventing suspects from being brought to trial... [Read more.](#)

## **Iraq: Fresh evidence that tens of thousands forced to flee Tuz Khurmatu amid indiscriminate attacks, lootings and arson, *Amnesty International***

Satellite images, videos, photos and dozens of testimonies collected by Amnesty International show that civilians were forced to flee their homes after fierce clashes erupted between Iraqi government forces, supported by the Popular Mobilization Units, and Kurdish Peshmerga forces in Iraq's multi-ethnic city of Tuz Khurmatu on 16 October 2017. Residents reported that at least 11 civilians were killed by indiscriminate attacks, while hundreds of properties were looted, set on fire and destroyed in what appears to be a targeted attack on predominantly Kurdish areas of the city... [Read more.](#)

## **Indonesia: US Documents Released on 1965-66 Massacres, HRW (New York)**

Newly released US government documents on the mass killings in [Indonesia](#) in 1965-66 underscore the need for the US and Indonesian governments to fully disclose all related classified materials, Human Rights Watch said today. Those classified documents are crucial to an accurate historical record of the killings and to provide justice for those crimes. The release on October 17, 2017, by the United States

nongovernmental public transparency organization [National Security Archive](#) of 39 US Embassy in Jakarta [documents](#) show that US diplomatic personnel were fully aware of the scale and savagery of the [1965-66 killings](#)... [Read more](#).

#### **Discovery of bodies puts Libya's Haftar under scrutiny, *Al Jazeera***

[Khalifa Haftar](#), who controls eastern [Libya](#), has ordered an investigation after 36 unidentified bodies were found in an area to the east of Benghazi. The bodies showed signs of torture and bullet wounds to the head. Witnesses say the victims were arrested months ago by Haftar's Libyan National Army. Sources have told Al Jazeera that those who went missing included opponents of Haftar and military dissidents who did not agree with his operations. The UN mission in Libya condemned the "heinous crime" that resulted in what is described as "the killing" of at least 36 people... [Read more](#).

#### **Prosecutor seeks to investigate Afghan war crimes allegations – and claims of US torture, *Guardian***

The chief prosecutor of the international criminal court is seeking approval to investigate allegations of war crimes in [Afghanistan](#), including possible torture by US forces and the CIA.

If authorised, the investigation would also look at crimes allegedly committed by armed opposition groups, such as the Taliban, and Afghan government forces.

The ICC chief prosecutor, Fatou Bensouda, said in [a report last year](#) that the US military and the CIA may have committed war crimes by torturing detainees in Afghanistan between 2003 and 2014... [Read more](#).

#### **So many war crimes, so little justice, *Swissinfo.ch***

The United Nations Joint Investigative Mechanism has announced its final conclusions on April's chemical attack on the Syrian town of Khan Sheikhoun, in which at least 80 people died.

The chemical used was the nerve agent Sarin, the UN investigators said on October 27, adding that they were "confident the Syrian Arab Republic [was] responsible".

The conclusions did not come as a surprise. Initial investigations by the Organisation for the Prohibition of Chemical Weapons and the UN's Commission of Inquiry on Syria had already yielded strong evidence about what happened in Khan Sheikhoun.... [Read more](#).

#### **The ICC Post-Withdrawal Jurisdiction on Burundi, *Jurist***

On October 27th, 2017 Burundi became the first State Party to withdraw from the [Rome Treaty](#) creating the [International Criminal Court](#) (ICC), in accordance with the provisions of [Article 127](#). It is worth recalling that prior to Burundi's withdrawal notice, the Office of the Prosecutor launched a preliminary examination into the situation in Burundi. Since this was a *motu proprio* move by the Office of the Prosecutor (OTP), the

latter cannot go further without an authorization from the Court. On the date of withdrawal, the Prosecutor has not formally seized the Pre-Trial Chamber (PTC) of an authorization request to open criminal investigations on the alleged third term related crimes ... [Read more](#).

#### **Iraq not equipped to try Islamic State's atrocities in Mosul: U.N., *Reuters***

Iraq is not capable of trying atrocities committed by Islamic State during the battle for Mosul so it must find other routes to justice such as the International Criminal Court (ICC), a U.N. human rights report said on Thursday... [Read more](#).

#### **Nigeria: 'Trial of Confirmed Boko Haram Terrorists to Commence in Kainji', *All Africa***

The Federal Government has disclosed its intention to commence trial of Boko Haram suspects in custody with established cases of terrorism at Kainji, Niger State.

This was disclosed yesterday by the Director of Prosecutions for the Ministry of Justice, Mr. Muhammed Umar, at the ongoing capacity building programme for the military and civil prosecutors in Abuja tagged: "Strengthening Justice and Accountability in Nigeria"

The Programme organised by Wayamo Foundation, Africa Group for Justice and Accountability (AGJA) and International Nuremberg Principles Academy, aims to address the most serious crimes under Nigerian criminal law...[Read more](#).

# Rostrum

## The Crime of Aggression: is the activation of ICC's jurisdiction near?

by Martina Costa, Legal Intern, Office of Public Counsel for the Defence, ICC

*The views expressed herein are those of the author alone and do not reflect the views of the ICC*

Consigned to the end of the public provisional agenda for this year's Assembly of States Parties (ASP) meeting lies a potentially seismic topic: the "[a]ctivation of the Court's jurisdiction over the crime of aggression". The ASP, which is the ICC's legislative body, meets annually in December, but this year will be the first time it will have the power to activate the Court's jurisdiction over this historic crime.

### How did the ASP reach this juncture?

The crime of aggression has always been included within the subject-matter jurisdiction of the Court, being one of the four core crimes listed in Article 5(d) of the Rome Statute. However, the original drafters of the Rome Statute in 1998 did not reach agreement on the crime's definition and jurisdictional regime. Therefore, Article 5(2) was added to serve as a placeholder for the crime, stating that the details on its definition and jurisdiction would be incorporated into the Rome Statute at a later date. It was only in 2010 that sufficient States Parties were able to agree on these details at the Kampala Review Conference.

They adopted RC/Resolution 6, which contained amendments to the Rome Statute (the "Kampala Amendments") providing for: (i) the definition of the crime

of aggression (Article 8bis); (ii) the Prosecutor's *proprio motu* powers to investigate the crime and how State referrals would work (Article 15bis) and how Security Council referrals would work (Article 15ter); as well as (iii) a set of "Understandings" between the States Parties as to how the provisions should be interpreted.

Notwithstanding, both Articles 15bis and 15ter, paragraphs 2 and 3, delay the immediate application of these articles, stating respectively that: (i) the "Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties" (the "First Condition"); and (ii) the "Court shall exercise jurisdiction over the crime of aggression [...] subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute" (the "Second Condition").

The First Condition appears to govern the jurisdiction *ratione temporis* of the crime of aggression. In other words, one year after the ratification or acceptance of the amendments by thirty States Parties, any alleged crimes of aggression theoretically

falls within the Court's jurisdiction. Such jurisdiction has existed since 26 June 2017, given that Palestine was the thirtieth State Party to ratify the amendments on 26 June 2016.

That leaves only the Second Condition as the final step before the Court can start exercising its jurisdiction over cases involving the crime of aggression. It is this Second Condition that will be discussed at the ASP's Sixteenth Session this December. To fulfil this condition, the ASP must decide by a two-thirds majority of States Parties to "activate" the jurisdiction.

### What are the implications if the ASP decides to activate the Court's jurisdiction over the crime of aggression?

Even if the ASP decides to activate the jurisdiction, some questions remain regarding how the First and Second Condition operate in relation to each other. If a crime of aggression is committed after 26 June 2017 but before the ASP activates the Court's jurisdiction, the Court theoretically has jurisdiction over the acts, although it may not actually exercise its jurisdiction. Different readings of the provision, supported by Understanding no. 3, suggest that both conditions should be met in order to claim jurisdiction, although this is still debated.



Even when the First and Second Conditions will be fulfilled and their interplay clearly understood, the crime of aggression will not be subject to a universal jurisdictional regime. As a matter of the fact, the conditions for the Court's exercise of jurisdiction over aggression allow for broad exceptions from the Court's default jurisdictional regime. On top of that, the exact scope of these exceptions is unknown because of the uncertainty around the entry-into-force mechanism applicable to the Kampala Amendments.

The Review Conference decided that the Kampala Amendments shall enter into force in accordance with Article 121(5); in other words, only for those States Parties which have accepted the amendments, one year after the deposit of their instruments of ratification or acceptance. The second sentence of the article states that in respect of a State Party which has not accepted the amendments, the Court shall not exercise its jurisdiction regarding a crime covered by the amendments when committed by that State Party's nationals or on its territory. The interpretation of Article 121(5) and, in particular, the applicability of its second sentence is a matter of debate. Therefore, it is disputed whether States Parties who have not accepted nor ratified the Kampala Amendments fall within the Court's jurisdiction when potential crimes of aggression are committed by their nationals or on their territory.

However, under Article 15*bis* (4), States may expressly opt out of the Court's jurisdiction for the crime of aggression by lodging a

declaration to that effect with the ICC Registrar, which must be reconsidered every three years. In respect of a State that is not a party to the Rome Statute, Article 15*bis*(5) affirms that the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory. As a result, States Parties that have opted out and States that are not a party to the Rome Statute are clearly out of the reach of the Court even when the crime is committed by the national or it occurs on the territory of a State Party bound to the amendment, a clear derogation from Article 12. The exception to this, however, is when the situation is referred by the Security Council, in which case the Court may always exercise jurisdiction – even over non-State Parties or State Parties that have opted out.

#### **What is the definition of the crime?**

Turning now to the definition of the crime, Article 8*bis* criminalises the “planning, preparation, initiation or execution” of a State act of aggression, limiting the scope of applicability of it to a small category of perpetrators: those who effectively exercise control over or direct the political or military action of a State. The State act of aggression then needs to meet an additional threshold, which is that it must constitute, by its character, gravity and scale, a manifest violation of the Charter of the United Nations. The second paragraph of Article 8*bis* defines the State act of aggression as the “use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or

in any other manner inconsistent with the Charter of the United Nations”. In addition, the provision enumerates a list of acts that qualify as acts of aggression. This definition clearly mirrors the one stipulated in the United Nations General Assembly's Resolution 3314 (XXIX) of 14 December 1974, which attempted to define aggression in a non-exhaustive way. While the open-ended character of the General Assembly's definition is not problematic from a public international law perspective, some have suggested that the list provided for in Article 8*bis* should be treated as exhaustive so to not offend the principle of legality enshrined in Article 22 of the Rome Statute.

Addressing many of the substantial and procedural issues that have been touched upon here will be a task for the ICC's Judges. In this respect, little interpretative guidance can be found either in international or domestic jurisdictions. As far as the former are concerned, the International Military Tribunals at Nuremberg and Tokyo and the Control Council No. 10 trials focused mainly on the prosecution of crimes against peace. Yet, the definition of the crime of aggression in Article 8*bis* is broader than its crimes-against-peace predecessor, whereas the class of potential perpetrators captured under Article 8*bis* is narrower than the one for crimes against peace.

#### **How will the ASP address the issue of activation of the jurisdiction this December?**

The ASP's Sixteenth Session will start on 4 December and finish on 13 December. A provisional agenda has been published

containing the 27 topics the States Parties will cover during that time, with the activation of the jurisdiction for the crime of aggression listed as item number 19 (ICC-ASP/16/1). It will be an unusually busy meeting this year: before they reach this item they have to hold elections for six new

Judges and discuss the election of the Registrar, as well as hear reports concerning

the Court's activities for 2017 and its detailed budget for 2018. Upon reaching the topic of activation, there will likely be discussions on the position papers that have been exchanged between States Parties, which could lead to technical debates on some of the jurisdictional uncertainties highlighted above. These will likely have to be resolved first before considering a vote to activate. If these discussions cannot be concluded

within the time given, the States Parties also have the option of postponing activation to the ASP's Seventeenth Session in December 2019, or, as has been suggested by some, convening a review conference – similar to the one in Kampala in 2010 – to deal with the issue specially.

## Blog Updates and Online Lectures

### Blog Updates

**"Lebanon and the Origins of International (Refugee) Law"**, by Maja Janmyr. Blog available [here](#).

**"Post-War Justice in Syria - Considering Universal and Domestic Options"**, by Hilly Moodrick-Even Khen. Blog available [here](#).

**"The Prohibition of Nuclear Weapons: Assisting Victims and Remediating the Environment"**, by Elizabeth Minor. Blog available [here](#).

### Online Lectures and Videos

**"Australia: Bringing balance to war - reaffirming the value of neutral humanitarian action"**, by Pete Giugni. Lecture available [here](#).

**"Genocide and International Law"**, by William A. Schabas. Lecture available [here](#).

**"Reflections on the Jurisdiction of the International Court of Justice"**, by Judge Awn Shawkat Al-Khasawneh. Lecture available [here](#).

## Publications and Articles

### Books

Dan Plesch. (2017). **Human Rights after Hitler : the Lost History of Prosecuting Axis War Crimes**, Georgetown University Press.

Robin Geiß, Andreas Zimmermann and Stefanie Haumer. (2017). **Humanizing the Laws of War : The Red Cross and The Development of International Humanitarian Law**, Cambridge University Press.

Martti Koskeniemi. (2017). **International Law and Religion: Historical and Contemporary Perspectives (The History and Theory of International Law)**, Oxford University Press.

### Articles

Gezim Visoka. (2017). **"Assessing the Potential Impact of the Kosovo Specialist Court"**, PAX and Impunity Watch.

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.

Harold Hongju Koh. (2017). **"Humanitarian Intervention: Time for Better Law"**, The American Society of International Law, Volume 111, pp. 287-291.

# Events

## The Story of ICTY Chambers: Behind the scenes insights into trial and appeal proceedings

Date: 16 November 2017

Location: Leiden University's Hague Campus, The Hague

For more information, click [here](#).

## Countering Terrorism in a Data-Driven Age

Date: 20 November 2017

Location: The Hague Institute for Global Justice

For more information, click [here](#).

## International Crimes: Past, Present and Future Perspectives

Date: 9 December 2017, deadline for registration: 1 December 2017

Location: The Hague Marriott Hotel, The Hague

For more information, click [here](#).

## Human Dignity and Human Security in Times of Terrorism Conference

Date: 14 December 2017

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

For more information, click [here](#).

## ICDL Annual Meeting

Date: 27 January 2018

Location: Intercontinental Hotel, Berlin

For more information, click [here](#).

# Opportunities

## Military Adviser (P-4)

Office of the High Commissioner for Human Rights, Beirut

Deadline: 15 November 2017

For more information, click [here](#).

## Witness Assistant (SSA)

International Criminal Court, The Hague

Deadline: 23 November 2017

For more information, click [here](#).

## Associate Judicial Coordinator (P-2)

International Criminal Court, The Hague

Deadline: 22 November 2017

For more information, click [here](#).

## Senior Legal Officer (P-4)

OPCW, The Hague

Deadline: 10 December 2017

For more information, click [here](#).

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