1. International Criminal Court: case update

There have been significant developments in at least three ICC cases in 2016, the most important of which is the *Bemba* case concerning, in part, the prosecution of crimes of sexual violence and the law of command responsibility.

Bemba

Trial Chamber III of the International Criminal Court handed down its judgment in *Prosecutor v Jean-Pierre Bemba Gombo* on 22 March 2016, finding Mr Bemba guilty, on the basis of his responsibility as a military superior, of murder and rape as both crimes against humanity and war crimes, and also of pillage as a war crime.

Mr Bemba was originally charged with having committed these crimes as a co-perpetrator under Article 25(1) of the ICC Statute (see chapter 12.7.2) before the charges were amended to include superior responsibility under Article 28(a) (see chapter 12.5). He was convicted on the latter basis only.

The judgment has been generally well received as making a positive contribution to the law of sexual offences as crimes against humanity or war crimes (see, for example, the comment by Patricia Sellers). In particular, the judgment:

- elaborates on the meaning of a ‘taking advantage of a coercive environment’ under the ICC Elements of Crimes as one of the circumstances in which rape can occur as a crime against humanity or war crime (paras 102-106); and
- confirms that under the ICC Statute ‘the victim’s lack of consent is not a legal element of the crime of rape’ and the Prosecution is not required to ‘prove the non-consent of the victim’ (para 105).

The judgment also discusses superior or command responsibility at some length (paras 170-213). It makes a number of points worth noting. Mr Bemba was convicted as someone effectively acting as military commander under Article 28(a), and this characterisation of his role depended in large part on the ‘effective authority and control test’ (para 178). The key test was whether Mr Bemba had ‘the material ability to prevent or repress the commission of the crimes or to submit the matter to the competent authorities’ (para 183). Further, it is not required that a relevant commander have sole control over the forces which committed crimes (para 185). The Chamber affirmed the principle that what a commander is required to do to prevent or repress the commission of crimes by subordinates is a question of both formal legal authority (*de jure*), if any, and what actual power the commander possesses (*de facto*) (paras 197-204).

The Chamber concluded that the causation element of command responsibility in the ICC Statute does not require ‘but for’ causation but will clearly be satisfied in cases where ‘the crimes would not have been committed … had the commander exercised control properly, or the commander exercising control properly would have prevented the crimes’ (paras 211-13). It did not discuss the finding by the Pre-Trial Chamber that it is ‘only necessary to prove that the commander’s omission increased the risk of the commission of the crimes charged in order to hold him criminally responsible under article 28(a) of the Statute’ (see

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Chapter 12.5.4). In her Separate Opinion, Judge Steiner suggested that this standard should be interpreted as requiring a 'high probability' that crimes would result and not simply an increasing in risk, 'however slight' (para 24). Judge Ozaki, in her Separate Opinion, suggested that the criminal consequences of a failure to properly exercise control would need to be at least 'reasonably foreseeable' before a superior could be held liable for the crimes of subordinates (para 23).

Reaction to the judgment has not, however, been uniformly positive. Kevin Jon Heller has been critical of the trial strategy of the Office of the Prosecutor (OTP) noting that it was the Pre-Trial Chamber which requested that the OTP include command responsibility in the charges. Alex Whiting has suggested that if the case signals there may be a greater reliance on command responsibility in the future that may not be an entirely good thing, as convictions based on command responsibility tend to attract lower sentences (at least in ICTY practice).

Ruto and Sang

In other news, the second major case arising out of the Kenya situation - *Prosecutor v. William Samoei Ruto and Joshua Arap Sang* - appears to have collapsed. On 5 April 2016 ICC Trial Chamber V(A) terminated the case. It did so without prejudice to the question of whether new prosecutions could be initiated later either before the ICC or national courts. The essential finding was that the Prosecution had not presented enough evidence upon which a Trial Chamber could convict the defendants. The decision is found here and a summary here. The ICC Prosecutor has blamed the collapse of the case on its 'politicisation' and 'witness interference', leading to 17 witnesses withdrawing their testimony.

The collapse of the other prosecution arising from the Kenyan situation, *Prosecutor v.* Kenyatta, was noted in Chapter 5.4.4.

Al Faqui

There have been press reports that Mr Al Faqi, the accused in *Prosecutor v. Ahmad Al Faqi Al Mahdi*, will plead guilty to the war crimes of destroying cultural property. If so, this will be the first guilty plea before the ICC.

Parties to the Rome Statute of the ICC

As at April 2016 there are now 124 State Parties to the ICC Statute. The two newest members are the State of Palestine (as of 2 January 2015) and El Salvador (as of 3 March 2016).

2. International Criminal Tribunal for the Former Yugoslavia: case update

The work of the ICTY continues to prove important and controversial. The Tribunal handed down three significant judgments in the period December 2015 - April 2016. Of these the most important is Karadzic for its examination of the mental element (*mens rea*) required for genocide and how it may be proved by the Prosecutor.

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Karadzic

The long-awaited judgment in *Prosecutor v Karadzic* was handed down on 25 March 2016, which immediately attracted criticism for being an unreadably long 2500 pages. (A much shorter summary is here.) As Marko Milanovic notes, the case had four parts: the 'crimes in a number of Bosnian municipalities; the siege of Sarajevo; the taking of UN hostages; and the Srebrenica massacre'. While there is some interesting discussion of the elements of the crime of hostage-taking (paras 467-468), the case will largely be analysed for its findings as to genocide, in particular its acquittal of Mr Karadzic in relation to charges of genocide in respect of the 'municipalities' but convicting him of genocide in respect of Srebrenica.

In essence, both charges turned on circumstantial evidence that Mr Karadzic had genocidal intent. Intent can be inferred from circumstantial evidence, but the rule of evidence is that it must be the *only* reasonable inference which can be drawn from the proven facts.

As regards the 'municipalities', the Trial Chamber considered that there was evidence of an intent to forcibly displace Bosnian Muslims in order to create an ethnically pure and enlarged Serbian State – but this did not lead to the conclusion that the only reasonable inference was that there was an underlying plan to destroy the Bosnian Muslim ethnic group as such (paras 2595-2605). A conviction was thus entered for crimes against humanity, not genocide.

Regarding the massacre at Srebrenica in 1995, the Trial Chamber did conclude that Mr Karadzic had genocidal intent. The essential finding was that Mr Karadzic knew of the killings in Srebrenica as they were taking place and approved of them. This finding, however, rested either on:

- evidence that Karadzic had had conversations with an official (Deronjić) who himself knew of the killings and had participated in plans to bury the bodies, without any further evidence of what Deronjić actually told Karadzic (paras 5805-13, 5829-5830); or
- inferences drawn as to what Karadzic must have known, given the Chamber's conclusion that Bosnian Serb forces carrying out the massacre must have had genocidal intent - on the basis that a plan to kill multiple generations of men would effectively result in the biological destruction of the group (para 5671).

In excellent blog posts both Kai Ambos and Marko Milanovic express some scepticism as to this logic in which knowledge is inferred and then used as evidence of intent. While the evidence supports a possible or even reasonable inference that Mr Karadzic knew of and even approved of the killings, is the *only* reasonable inference that he intended the biological destruction of a group?

Such questions, of course, cast no doubt on the correctness of a conviction for crimes against humanity. They do, nonetheless, illustrate the difficulties of proof of genocidal intent.

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Stanišić & Simatović

On 9 December 2016, the ICTY Appeals Chamber quashed the acquittals in *Prosecutor v Stanišić & Simatović* and ordered a re-trial. In *Prosecutor v Stanišić & Simatović*, the two defendants were acquitted on charges of aiding and abetting because 'specific direction' had not been proven as required by *Perišić* (see chapter 12.4.2.1). However, the ICTY Appeals Chamber in *Sainovic* soon after held that 'specific direction' was not a requirement of the law of aiding and abetting. The decision in *Stanišić & Simatović* clearly follows *Sainovic*. The retrial will be conducted by the Mechanism for International Criminal Tribunals (the 'residual mechanism').

Šešejl

On 31 March 2016, the ICTY acquitted the defendant in *Prosecutor v Šešejl*. The decision has attracted academic criticism as being poorly reasoned. Overall, the judgment concludes (contrary to numerous other ICTY cases) that there was no proof that crimes against humanity were committed in Bosnia and Croatia in the relevant period. At present, only a summary of the judgment has been released, which appears extraordinarily critical of the work of the Prosecutor.

In terms of specific errors of law, Marko Milanovic explains, for example, that the presiding Judge, Judge Antonetti, in his Separate Opinion appears to confuse concepts as basic as 'intent' and 'motive'. That is, the Judge held that because the alleged participants in a common criminal plan to forcibly displace civilians appeared to have different political goals, there was no common plan. Obviously, people with different motivations may nonetheless participate in a plan with a single criminal goal. The dissenting opinion of Judge Lattanzi also strongly criticises the other two judges in the case for frequently considering irrelevant questions of law, such as whether the recourse to war was justified (a question of the *jus ad bello* over which the ICTY has no jurisdiction), rather than whether the laws of war were violated (*jus in bello*).

While an appeal is expected, it is not clear that the defendant will be returned to the ICTY to stand trial again (if a re-trial is ordered), or will even live long enough for an appeal to be completed.

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