



Hague Case Law: Latest Developments

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International Criminal Court

(1) *The Prosecutor v. Dominic Ongwen (Sentence)*

On 6 May 2021, Trial Chamber IX of the International Criminal Court (‘the Chamber’) sentenced Dominic Ongwen to 25 years of imprisonment following the Trial Judgement in which the Chamber found him guilty of a total of 61 crimes comprising crimes against humanity and war crimes, committed in Northern Uganda between 1 July 2002 and 31 December 2005.

Judge Bertram Schmitt highlighted that the Chamber was confronted in the present case with a unique situation. It was confronted with a perpetrator who had wilfully and unambiguously brought tremendous suffering upon his victims. However, it was also confronted with a perpetrator who had himself previously endured extreme suffering at the hands of the group of which he later became a prominent member and leader. The Chamber decided to give certain weight in mitigation to the circumstances of Dominic Ongwen’s childhood, his abduction by the Lord’s Resistance Army (‘LRA’) at a very young age and his early stay with the LRA.

The Chamber, however, rejected the Defence’s arguments concerning the mitigating circumstances of substantially diminished mental capacity and duress. The Chamber also rejected the arguments of the Defence concerning traditional justice mechanisms, noting that there exists no possibility under the Rome Statute to replace a term of imprisonment with traditional justice mechanisms, or to incorporate traditional justice mechanisms into the sentence in any other way.

The Chamber analyzed, one by one, the gravity of each of the 61 crimes for which Dominic Ongwen was convicted, finding several aggravating circumstances applicable to some or even most of the crimes. Aggravating circumstances included particular cruelty, the multiplicity of victims, the victims being particularly defenceless, and discrimination on political grounds and discrimination against women.

The Chamber imposed individual sentences for each crime but declined to sentence Dominic Ongwen to life imprisonment. The Chamber decided to impose a

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joint sentence of 25 years of imprisonment. The Chamber was of the view that this joint sentence adequately reflected the strongest condemnation by the international community of the crimes committed by Dominic Ongwen and acknowledged the great harm and suffering caused to the victims. At the same time, the Chamber held that such a joint sentence acknowledges Dominic Ongwen's unique personal history and safeguards the prospect of his successful social rehabilitation and, consequently, the concrete possibility of future reintegration into society.

International Residual Mechanism for Criminal Tribunals

(1) *The Prosecutor v. Jovica Stanišić and Franko Simatović*

On 30 June 2021 the Trial Chamber pronounced its judgement in the case of *Prosecutor v. Jovica Stanišić and Franko Simatović*.

The proceedings first commenced before the International Criminal Tribunal for the former Yugoslavia ('ICTY') in 2003, around 18 years ago, when the accused were indicted and transferred to the Tribunal. The first trial concluded on 30 May 2013 with a verdict of acquittal on all counts. In December 2015, the Appeals Chamber of the ICTY quashed the acquittals and ordered a full retrial in this case.

That decision started the case anew before the Mechanism, necessitating a new initial appearance and pre-trial process. During the retrial, the Trial Chamber received the evidence of 145 witnesses, including the live testimony of 80 witnesses, and admitted into evidence more than 6,300 exhibits. It also issued nearly 450 decisions and orders.

The case concerned Jovica Stanišić, who was Deputy Chief and later Chief of the Serbian State Security Service, and Franko Simatović, one of the Service's senior intelligence officers. The Prosecution had charged them with war crimes and crimes against humanity, including murder, deportation, forcible transfer, and persecution, allegedly committed by Serb forces in Croatia and Bosnia and Herzegovina between April 1991 and December 1995.

The Prosecution alleged that they had committed war crimes and crimes against humanity by participating in a joint criminal enterprise. In the alternative, the Prosecution alleged that the accused were responsible for having planned, ordered, and/or aided and abetted in the commission of the crimes.

The Trial Chamber considered that the systematic pattern of crimes committed against non-Serb civilians by Serb forces constituted the most compelling evidence, demonstrating the existence of a common criminal purpose. Moreover, the Trial Chamber was convinced that, from at least August 1991, a joint criminal enterprise had existed. The Trial Chamber then turned to the question of whether the accused participated in this joint criminal enterprise and shared its members' intent.

The indictment alleged that the accused had participated in the joint criminal enterprise by providing channels of communication between and among the core members of the joint criminal enterprise in Belgrade and locally, and by directing and organizing the formation of, and the financing, training, logistical support and

other substantial assistance or support to various Serb forces, including special units of the Serbian State Security Service.

The Trial Chamber found that the Prosecution had not proven beyond reasonable doubt that, other than in relation to Bosanski Šamac, the accused contributed to or provided practical assistance to the commission of the crimes charged in the indictment through special purpose units of the Serbian State Security Service.

In relation to the accused's intent, the Trial Chamber found that Stanišić had a comprehensive knowledge of the events on the ground in Croatia and Bosnia and Herzegovina during the indictment period and that Simatović also had unimpeded access to information about events on the ground, one of his primary tasks during the indictment period being the collection of intelligence. Further, the Trial Chamber found proven beyond reasonable doubt that both accused had been aware of the campaign of murder, persecution, and forcible displacement targeting non-Serbs in Croatia and Bosnia and Herzegovina during the indictment period. Moreover, according to the Trial Chamber, the only reasonable inference from the evidence could be that the accused had also been aware of the shared intent of the members of the joint criminal enterprise to forcibly and permanently remove the majority of non-Serbs from large areas of Croatia and Bosnia and Herzegovina, through the commission of the crimes charged in the indictment.

The Trial Chamber, however, did not find that the only reasonable inference from the evidence could be that Stanišić and Simatović had shared the intent to further the common criminal purpose. Accordingly, the Prosecution had not proven beyond reasonable doubt that the accused had participated in a joint criminal enterprise.

Nonetheless, the Trial Chamber found that the accused had provided practical assistance, which had a substantial effect on the commission of the crimes of murder, forcible displacement, and persecution committed in Bosanski Šamac, and had been aware that their acts assisted in their commission. Accordingly, the Trial Chamber found Jovica Stanišić and Franko Simatović responsible for aiding and abetting, under Article 7(1) of the ICTY Statute, the crimes of murder, deportation, forcible transfer, and persecution in Bosanski Šamac and sentenced Jovica Stanišić to a single sentence of 12 years of imprisonment, and Franko Simatović to a single sentence of 12 years of imprisonment. The Trial Chamber did not find the accused responsible for planning, ordering, or aiding and abetting any other charged crime.

(2) *The Prosecutor v. Ratko Mladić (Appeal Judgement)*

On 8 June 2021, the Appeals Chamber pronounced its judgement in the case of *Prosecutor v. Ratko Mladić* pursuant to Rule 144(D) of the Mechanism's Rules of Procedure and Evidence.

From 27 September 1965 until 10 May 1992, Ratko Mladić was a member of the Yugoslav People's Army and held various positions in military posts throughout the former Yugoslavia. On 12 May 1992, the Bosnian Serb Assembly appointed Mladić as Commander of the Main Staff of the Army of Republika Srpska ('VRS') and he remained in command until at least 8 November 1996.

On 24 July 1995 and 16 December 2011, the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia ('ICTY' and 'Prosecution')

filed the respective initial and operative indictments against Mladić ('Indictment'), charging him with individual criminal responsibility on 11 counts of genocide, crimes against humanity, and violations of the laws or customs of war under Articles 3, 4, and 5 of the Statute of the ICTY ('ICTY Statute'), covering crimes allegedly committed between 12 May 1992 and 30 November 1995 in Bosnia and Herzegovina.

On 22 November 2017, Trial Chamber I of the ICTY ('Trial Chamber') acquitted Mladić of genocide under Count 1 of the Indictment in relation to crimes committed against Bosnian Muslims and Bosnian Croats in certain municipalities throughout Bosnia and Herzegovina. The Trial Chamber convicted Mladić, pursuant to Article 7(1) of the ICTY Statute, of: (1) genocide; (2) persecution, extermination, murder, deportation, and inhumane acts as crimes against humanity; and (3) murder, terror, unlawful attacks on civilians, and the taking of hostages as violations of the laws or customs of war. The Trial Chamber found Mladić responsible for committing these crimes through his 'leading and grave role' in four joint criminal enterprises ('JCEs'): (1) the 'Overarching JCE', aiming to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in Bosnia and Herzegovina between May 1992 and November 1995; (2) the 'Sarajevo JCE', aiming to spread terror among the civilian population of Sarajevo through a campaign of sniping and shelling between May 1992 and November 1995; (3) the 'Srebrenica JCE', aiming to eliminate the Bosnian Muslims in Srebrenica between July and at least October 1995; and (4) the 'Hostage-Taking JCE', aiming to capture UN Protection Force ('UNPROFOR') and UN Military Observer(s) personnel deployed in Bosnia and Herzegovina and detain them in strategic military locations to prevent the North Atlantic Treaty Organization ('NATO') from launching further air strikes against Bosnian Serb military targets from May to June 1995. The Trial Chamber sentenced Mladić to life imprisonment.

Mladić filed an appeal challenging his convictions and sentence. He requested that the Appeals Chamber reverse all erroneous findings of the Trial Chamber, quash his convictions, and acquit him. In the alternative, Mladić sought a retrial or a reduction in his sentence. The Appeals Chamber dismissed Mladić's appeal in its entirety.

The Prosecution requested that the Appeals Chamber correct the Trial Chamber's errors and convict Mladić of genocide under Count 1 of the Indictment.

Under Count 1 of the Indictment, the Prosecution alleged that, between 31 March 1992 and 31 December 1992, Mladić committed in concert with others, planned, instigated, ordered, and/or aided and abetted genocide against a part of the Bosnian Muslim and/or Bosnian Croat groups, as such, in some municipalities of Bosnia and Herzegovina.

The Trial Chamber found that a large number of Bosnian Muslims and/or Bosnian Croats in these municipalities were the victims of prohibited acts of genocide, such as killings or serious bodily or mental harm, which contributed to the destruction of their groups. The Trial Chamber further found, by majority, that certain physical perpetrators of these prohibited acts had the intent to destroy a part of the Bosnian Muslim group when carrying out the prohibited acts, except in relation to Bosnian Muslims in Ključ. However, the Trial Chamber was not convinced beyond reasonable doubt that those perpetrators intended to destroy the Bosnian Muslims in

Sanski Most, Foča, Kotor Varoš, Prijedor, and Vlasenica ('Count 1 Municipalities'), 'as a substantial part of the protected group'. The Trial Chamber was also not convinced beyond reasonable doubt that the Bosnian Serb leadership possessed genocidal intent or that the crime of genocide formed part of the objective of the Overarching JCE. Accordingly, the Trial Chamber acquitted Mladić of genocide under Count 1 of the Indictment.

Under Ground 1 of its appeal, the Prosecution argued that the Trial Chamber had erroneously concluded that the Bosnian Muslim communities of the Count 1 Municipalities did not each constitute a substantial part of the Bosnian Muslim group.

In addressing this argument, the Appeals Chamber recalled that, where a conviction for genocide relies on the intent to destroy a protected group 'in part', the targeted part must be a substantial part of that group. In particular, the Appeals Chamber found that the Prosecution had not demonstrated any error in the Trial Chamber's conclusion that the Bosnian Muslim communities of the Count 1 Municipalities each formed 'a relatively small part' of the group. With respect to the Prosecution's contention that the destruction of the Bosnian Muslim communities of the Count 1 Municipalities would in each case have been significant enough 'to have an impact on the Bosnian Muslim "group as a whole"', the Appeals Chamber recalled that it is not just any impact on a protected group that supports a finding of genocidal intent. Rather, it is the impact that the destruction of the targeted part will have on the overall survival of that group which indicates whether there is an intent to destroy a substantial part thereof. The Appeals Chamber found that, with respect to the Bosnian Muslim communities of the Count 1 Municipalities, neither the Trial Chamber's findings nor the evidence referred to by the Prosecution reflected such a threat to the viability or survival of the Bosnian Muslim group. The Appeals Chamber dismissed Ground 1 of the Prosecution's appeal, since it found that the Prosecution had failed to demonstrate that the Trial Chamber had erred in concluding that the Bosnian Muslim communities of the Count 1 Municipalities did not each constitute a substantial part of the Bosnian Muslim group in Bosnia and Herzegovina.

Under Ground 2 of its appeal, the Prosecution submitted that the Trial Chamber had erred in concluding that genocide did not form part of the common purpose of the Overarching JCE by failing to infer the 'destructive intent' of Mladić and other Overarching JCE members, and by applying a heightened evidentiary threshold in its assessment thereof.

The Appeals Chamber recalled, however, that a substantiality assessment considers the impact that the destruction of the targeted part will have on the overall survival of that group. Noting that the Bosnian Muslim communities of the Count 1 Municipalities collectively comprised approximately 6.7 per cent of the Bosnian Muslim group, the Appeals Chamber considered that a reasonable trier of fact could reasonably have concluded that these communities, individually as well as cumulatively, formed 'a relatively small part' thereof. The Appeals Chamber therefore concluded that a reasonable trier of fact could also have found that the destruction of the Bosnian Muslim communities of the Count 1 Municipalities, individually as well as cumulatively, was not sufficiently substantial to have an impact on the group's overall survival at the relevant time. Based on the foregoing, the Appeals Chamber dismissed Ground 2 of the Prosecution's appeal.

The Appeals Chamber dismissed the Prosecution's appeal in its entirety, affirmed the disposition of the Trial Chamber finding Mladić not guilty of genocide under Count 1 of the Indictment, and affirmed the sentence of life imprisonment imposed on Mladić by the Trial Chamber.

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