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The War Crimes Research Office Presents: News from the International Criminal Tribunals

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THE WAR CRIMES RESEARCH OFFICE PRESENTS: NEWS FROM THE INTERNATIONAL CRIMINAL TRIBUNALS

Part III: International Criminal Tribunal for the former Yugoslavia (ICTY)

by Cecile E.M. Meijer*

Kvočka et al.

On November 2, 2001, the ICTY Trial Chamber delivered its Judgement in the *Kvočka et al.* case (*Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlaco Radić, Zoran Žigić, and Dragoljub Prcać*, Case No. IT-98-30/1-T). The amended indictment had charged the accused with seventeen counts of crimes against humanity and violations of the laws or customs of war. Amongst others, the charges included persecutions on political, racial or religious grounds by way of murder; torture and beating; sexual assault and rape; harassment, humiliation and psychological abuse; and confinement in inhumane conditions. Žigić was the only accused in this case to be charged with crimes in locations other than the Omarska camp (*i.e.*, Keraterm and Trnopolje camps). The indictment charged Žigić with individual responsibility under Article 7(1) of the ICTY Statute. The others accused were charged with individual and superior responsibility under Articles 7(1) and 7(3). The Trial Chamber concluded that the evidence showed beyond a reasonable doubt that the Omarska camp functioned as a joint criminal enterprise, and found the accused guilty of persecution as a crime against humanity, and murder, torture and cruel treatment (Žigić only) as violations of the laws or customs of war under Article 7(1). It sentenced the accused to prison terms ranging between five and twenty-five years. All received credit for time served.

The *Kvočka et al.* case concentrated largely on atrocities committed in the Omarska camp during the summer of 1992, and the role of the accused in the camp's operations. The Omarska camp was a so-called "collection centre" in the north-east of Bosnia-Herzegovina, where thousands of detainees (mostly Muslims and Croats) were interrogated purportedly in an attempt to identify who was a suspect of and/or collaborator with the non-Serb opposition. The court heard evidence about the deplorable conditions in the camp, where food and water were poor in quality and quantity, and where hygienic and living conditions were grossly inadequate. The court found that the interrogations were conducted in a cruel and inhumane fashion, the detainees were frequently subjected to mental and physical violence throughout the camp, and the few female detainees were subjected to various forms of sexual assault, including rape. Both the abusive camp conditions and the acts of extreme physical mistreatment often resulted in the death of detainees. The Trial Chamber found that "the non-Serbs detained . . . were subjected to a series of atrocities and that the inhuman conditions were imposed as a means of degrading and subjugating them. Extreme brutality was systematic in the camp and utilized as a tool to terrorize the Muslims, Croats, and the other non-Serbs imprisoned therein."

After finding all of the accused guilty of persecution, the court applied the cumulative convictions test using the two-prong test set forth in the *Čelebići* Appeals Chamber

judgement, and subsequently dismissed the murder and other charges covered by the persecution conviction when based on the same underlying conduct.

The Trial Chamber elaborated extensively on the theories of criminal responsibility under Article 7(1) of the ICTY Statute, examining in particular the "joint criminal enterprise" theory, which previous jurisprudence had found to be included implicitly in Article 7(1). The Chamber restated the three elements identified in the *Tadić* Appeals Chamber judgement that require proof in order for joint criminal enterprise liability to arise: (1) a plurality of persons; (2) the existence of a common plan which amounts to or involves the commission of a crime provided for in the Statute; and (3) participation of the accused in the execution of the common plan. Given the facts of the case, the court limited the scope of its analysis primarily to one particular situation of joint criminal enterprise liability, namely where the accused have personal knowledge of a system of ill-treatment and demonstrate an intent to further or otherwise participate in the system of abuse. The court examined in depth the post World War II "concentration camp" cases.

In assessing the necessary *mens rea* (intent) for different modes of participation in a joint criminal enterprise (co-perpetration and aiding or abetting), the Trial Chamber, having examined relevant post World War II jurisprudence, opined that "a co-perpetrator of a joint criminal enterprise shares the intent to carry out the joint criminal enterprise and performs an act or omission in furtherance of the enterprise; an aider or abettor of the joint criminal enterprise need only be aware that his or her contribution is assisting or facilitating a crime committed by the joint criminal enterprise."

The Trial Chamber examined what level of participation is required for lower level persons to be criminally liable under the joint criminal enterprise theory, especially those who did not order or organize the camps, nor orchestrate their operations. Again, the court analyzed relevant post World War II jurisprudence and concluded that it shows that "when a detention facility is operated in a manner which makes the discriminatory and persecutory intent of the operation patently clear, anyone who knowingly participates in any significant way in the operation of the facility or assists or facilitates its activity, incurs individual criminal responsibility for participation in the criminal enterprise, either as a co-perpetrator or an aider and abettor, depending upon his position in the organizational hierarchy and the degree of his participation." The person's acts or omissions must significantly assist or facilitate the commission of the crimes, which means that the act or omission "makes an enterprise efficient or effective; e.g., a participation that enables the system to run more smoothly or

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without disruption.” This level of participation must be determined on a case by case basis and depends on various factors. Furthermore, crimes that are committed to further the joint criminal enterprise and that are natural and foreseeable consequences of the enterprise can also be attributed to a person (aider, abettor, and co-perpetrator) who knowingly participates in the enterprise in a significant way.

Next, the Trial Chamber carefully analyzed the criminal responsibility of each of the accused in the joint criminal enterprise. Using the above legal framework, the Chamber addressed for each accused his personal background; arrival and duration in Omarska camp; duties and position in the camp; knowledge of camp conditions and abusive treatment during his time in the camp; whether he physically perpetrated abuses; and whether his participation was significant enough to incur criminal responsibility. In addition, the court examined issues that were more specific to a particular accused.

With respect to Kvočka, a Serb police officer, the court found that he served in the Omarska camp in a position which the court found to be the functional equivalent of a deputy commander with some degree of authority over the guards. According to the evidence, he had extensive knowledge of the camp’s abusive practices and conditions, but did little to prevent or ease them. He was also aware of serious crimes being committed in the camp and sometimes witnessed them. Nonetheless, Kvočka performed his duties in the camp for at least seventeen days in a skillful and efficient manner, without complaint. As deputy of the camp commander, he made a significant contribution to the camp’s administration and functioning. Finally, the court found beyond a reasonable doubt that Kvočka “was aware of the context of persecution and ethnic violence prevalent in the camp and he knew that his work in the camp facilitated the commission of crimes.” Based on the above findings, the Trial Chamber concluded that Kvočka was a co-perpetrator of the joint criminal enterprise that was the Omarska camp. The Trial Chamber convicted Kvočka under Article 7(1) of the Statute for persecution as a crime against humanity and for murder and torture as violations of the laws or customs of war. He was sentenced to seven years’ imprisonment.

The court followed largely similar reasoning with regard to Prcać, a pensioner who was mobilized in April 1992 and worked for about twenty-two days as an administrative aid of the Omarska camp commander, and Kos, a guard shift leader who was involved in beatings and extortion of detainees. Like Kvočka, both were found guilty under Article 7(1) of co-perpetration in a joint criminal enterprise and convicted of persecution as a crime against humanity, as well as murder and torture as violations of the laws or customs of war. Prcać received a prison sentence of five years, while Kos received six years.

Radić was also a guard shift leader and worked during the entire three months that the Omarska camp was in operation. He exerted substantial authority over certain guards and his shift was notorious for the camp’s most brutal cases of physical and mental abuse or mistreatment. Radić knew of these crimes and their discriminatory purpose, and frequently was exposed directly to them. The Trial Chamber found that he never used his authority to stop the crimes committed by the guards in his shift, and that his failure to do so in fact encouraged the guards to continue,

as Radić seemed to condone their actions. In addition, Radić personally committed or threatened to commit the crime of rape and other forms of sexual violence against non-Serb women. The court qualified his contribution to the camp’s maintenance and functioning as substantial, concluding that he “willingly and intentionally contributed to the furtherance of the joint criminal enterprise.” Radić was found guilty, under Article 7(1), as a co-perpetrator of persecution, murder and torture including rape and other forms of sexual violence, all of which were committed as part of the joint criminal enterprise operative in the Omarska camp. He was sentenced to twenty years in prison.

Lastly, the court considered the alleged crimes perpetrated by Žigić, a taxi driver who frequently went to the Omarska camp to abuse detainees. The Trial Chamber found that Žigić personally and directly committed crimes on discriminatory grounds, that his participation in the joint criminal enterprise was significant, and that he knew of the persecutory character of the crimes. This made him a co-perpetrator in the joint criminal enterprise at Omarska. In relation to the Omarska atrocities, Žigić was found guilty of persecution, murder, and torture. Žigić was also charged with and convicted of crimes committed in the Keraterm and Trnopolje camps, namely persecution as a crime against humanity, as well as murder, torture, and cruel treatment as violations of the laws or customs of war. The court sentenced Žigić to twenty-five years’ imprisonment.

Part IV — International Criminal Tribunal for Rwanda (ICTR)

General

During 2001, several institutional changes took place at the ICTR. On March 1, 2001, Mr. Adama Dieng of Senegal was sworn in as the new Registrar of the ICTR. Pursuant to UN Security Council Resolution 1329 of November 30, 2000, Judge Winston Churchill Matanzima Maqutu of Lesotho and Judge Arlette Ramaroson of Madagascar were appointed as the two additional judges to the Arusha-based ICTR. Furthermore, two ICTR judges assumed their responsibilities in the Hague as new members of the Appeals Chamber that is common to both the ICTR and ICTY: Judge Mehmet Güney from Turkey and Judge Asoka de Zoysa Gunawardana of Sri Lanka. Judge Andréia Vaz of Senegal replaced the late Judge Laïty Kama (also of Senegal) who died in May 2001. In the summer of 2001, ICTR President Pillay requested the UN to appoint *ad litem* judges, “to enable the timely completion of the mandate of the Tribunal.”

During 2001, the ICTR issued several judgements on the merits. The Appeals Chamber rendered judgements in the *Akayesu*, *Kayishema and Ruzindana*, and *Musema* cases. Of these three cases, only the *Akayesu* appeals judgement is reviewed here. The ICTR Trial Chamber delivered one judgement on the merits: the *Bagilishema* case, the first ICTR acquittal on genocide charges.

Appeals Chamber

Akayesu

On June 1, 2001, the Appeals Chamber rendered its Judgement in *The Prosecutor v. Jean-Paul Akayesu*, Case No.

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ICTR-96-4-A. Akayesu was the “bourgmestre” (mayor) of Taba during the 1994 Rwandan genocide. The Trial Chamber had found Akayesu guilty of genocide, direct and public incitement to commit genocide and crimes against humanity, but not guilty of complicity in genocide, and of violations of Common Article 3 of the Geneva Conventions and Article 4(2) (e) of Additional Protocol II (judgment of September 2, 1998). The Trial Chamber had sentenced him to life imprisonment. Both Akayesu and the Prosecution appealed. The Appeals Chamber dismissed all of Akayesu’s challenges, thus affirming his convictions and sentence. On December 9, 2001, Akayesu was transferred to Mali to serve his prison term.

Akayesu’s grounds of appeal were largely of a procedural and evidentiary nature. For example, Akayesu claimed that he had been denied the right to be defended by counsel of his choice, and the right to competent counsel. Other appeals grounds addressed, *inter alia*, allegations that the tribunal was biased and partisan; improper amendment of the original indictment during trial; improper treatment of prior witness statements; out of court evidence; improper hearsay evidence; irregularities in the examination and cross-examination of witnesses; and sentencing. All of Akayesu’s grounds of appeal failed.

The grounds of appeal raised by the Prosecution addressed alleged errors of law by the Trial Chamber, which all fell outside the scope of Article 24 of the ICTR Statute. Article 24 requires that an appeal must pertain to an error of law which invalidates the decision or an error of fact which has occasioned a miscarriage of justice. The Prosecution acknowledged that its appeals grounds would have no bearing on the Trial Chamber’s judgment, but argued that they were nonetheless “important matters of general significance to the Tribunal’s jurisprudence.” The Appeals Chamber agreed and ruled that it has jurisdiction to determine such issues even if they are the only ones put forward by a party on appeal, provided the issues are “of interest to legal practice of the Tribunal and . . . have a nexus with the case at hand.” The Chamber found that the Prosecution’s grounds of appeal met both requirements. In his Dissenting Opinion, Judge Nieto-Navia disagreed with the Chamber’s majority on this point and expressed the view that Article 24 of the Statute should be given a strict interpretation.

In considering the Prosecution’s grounds of appeal, the Appeals Chamber made important pronouncements on three issues: (1) whether a “public agent or government representative test” applies to determine a person’s culpability for violations of Common Article 3 of the Geneva Conventions; (2) the scope of discriminatory intent in relation to crimes against humanity; and (3) whether instigation as articulated under Article 6(1) of the ICTR Statute must be direct and public. In its disposition, the Appeals Chamber sets out the relevant legal findings regarding these points of law raised by the Prosecution.

In order to answer the question whether the perpetrator of a Common Article 3 violation must be a public agent or government representative in order to incur individual criminal responsibility, the Appeals Chamber examined the ICTR Statute, and the text, object, and purpose of Common Article 3. The Chamber found that neither the ICTR Statute nor the text of Common Article 3 explicitly limits such responsibility to a particular group of individuals.

Seen in conjunction with the duty under Common Article 3 to afford minimum protection to victims, the Chamber opined that “it does not follow that the perpetrator of a violation of Article 3 must of necessity have a specific link” with a particular category of persons. Furthermore, although in most cases there may exist a nexus between the perpetrator of the violation of Common Article 3 and one particular party to the conflict, “such a special relationship is not a condition precedent to the application of common Article 3 and, hence of Article 4 of the Statute.”

The second issue concerned a contradiction in the Trial Chamber judgment where it had found that in case of murder and rape under Article 3 of the Statute, the perpetrator must have the discriminatory intent *vis-a-vis* the victim, while in case of extermination and torture “the attack must be on discriminatory grounds.” The Appeals Chamber opined that the discriminatory grounds in the chapeau of Article 3 are a “restriction of jurisdiction,” and that crimes against humanity “continue to be governed in the usual manner by customary international law, namely that discrimination is not a requirement for the various crimes against humanity, except where persecution is concerned.” The requirement remains, however, that the attack be against the civilian population on national, political, ethnic, racial, or religious grounds.

Finally, the court addressed whether instigation under Article 6(1) of the ICTR Statute must be direct and public. The Appeals Chamber rejected this proposition as being inconsistent with the plain and ordinary meaning of the provision. Although incitement to genocide contains an additional element requiring that the incitement be direct and public, such additional element does not exist for instigation under Article 6(1), according to the Chamber.

Trial Chamber

Bagilishema

On June 7, 2001, the ICTR Trial Chamber delivered its Judgment in *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T. The amended indictment charged Bagilishema with seven counts of genocide, complicity in genocide, crimes against humanity and serious violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II. He was charged with individual and superior responsibility under Articles 6(1) and 6(3) of the ICTR Statute. In a landmark decision, the Trial Chamber unanimously acquitted Bagilishema of three counts, including genocide. The Chamber’s majority found him also not guilty of the remaining four charges which included complicity in genocide, with Judge Mehmet Güney dissenting (Separate and Dissenting Opinion). Thus, Bagilishema was acquitted of all charges.

During the Rwanda genocide, Bagilishema was the “bourgmestre” (mayor) of Mabanza *commune*, which belonged to the Kibuye Prefecture headed by Prefect Clément Kayishema (Kayishema lost his appeal before the ICTR on June 1, 2001, and is currently serving a prison sentence for the remainder of his life for genocide). Following the downing of the plane of the Rwandan president on April 6, 1994, and the start of hostilities, people began to seek refuge at the *bureau communal* (communal office) in Mabanza. Due to security problems in Mabanza, on April 13, 1994, the refugees moved to two sites in Kibuye: the Stadium

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and the Home St. Jean Complex (Complex). Thousands of refugees were detained in harsh conditions at the Kibuye Stadium, without food, water, or sanitation. A few days after their arrival, many of those held at the Stadium and the Complex were massacred.

The Trial Chamber did not hold Bagilishema directly responsible for the mistreatment of the refugees in the Stadium or for the massacres because the Prosecution had failed to prove beyond a reasonable doubt that he incurred responsibility. The Chamber also found unproven the Prosecution's allegation that in instructing the refugees to move to Kibuye, the accused "knew or had reason to know that attacks at these locations [were] imminent." Moreover, it found that the Prosecution had failed to show that Bagilishema "was notified or should have known about the inhumane conditions at the Stadium, or about the attack on the Complex, or about the imminent attack on the Stadium." Finally, the court found that the Prosecution had not demonstrated that the accused's failure to take sufficient follow-up actions (*e.g.*, punishment) as "*bourgmestre*" amounted to acquiescence in the killings, constituting aiding and abetting. Judge Güney disagreed with these findings.

In the period April 13 to July 1994, killings continued to take place in Mabanza and the Prosecution charged Bagilishema with several individual instances. In each case, however, the Chamber found the accused not criminally responsible because the allegations had not been proven beyond a reasonable doubt.

Lastly, the amended indictment charged Bagilishema with crimes in relation to the establishment and operation of several roadblocks at which some people, in particular Bigirimana and Judith, had been killed. In addition to examining the individual and superior criminal liability of the accused in these cases under Article 6(1) and Article 6(3) (which both failed), the Trial Chamber analyzed whether Bagilishema was responsible because of gross negligence. The court described this form of liability as "a species of liability by omission" that would be available "if the Prosecution were to show that the Accused had been grossly negligent in his administration of one or more roadblocks under his control, such negligence causing the murder of Tutsi civilians (by roadblock staff)."

The Trial Chamber held that for liability on the basis of criminal negligence to arise in this case, the Prosecution not only had to prove Bagilishema's public duty in security matters, but also the following four cumulative elements: (1) "that one or more crimes were committed in connection with identified roadblocks;" (2) "that [Bagilishema] was responsible for the administration of those roadblocks because he was involved in their establishment, acquiesced to their continuing existence, or more generally because they came under his control as *bourgmestre*;" (3) "that measures, if any, taken by [Bagilishema] to detect and prevent crimes in connection with the stated roadblocks were clearly inadequate in the circumstances;" and (4) "that the crimes in question would have been detected or prevented had [Bagilishema] administered the roadblocks with reasonable diligence." The Chamber found that not all of these elements had been proven beyond a reasonable doubt; in particular, the Prosecution had failed to prove "the Accused's wanton disregard for high-risk activities at

roadblocks" and that "having established the Trafipro roadblock, the Accused neglected to regulate the conduct of those staffing it, thus causing the deaths of Bigirimana and Judith." Consequently, the court also declined to hold Bagilishema responsible on the basis of criminal negligence. The Prosecution has appealed this acquittal.

Judge Güney disagreed in his Separate and Dissenting Opinion on two points. In his view, there was sufficient evidence to hold Bagilishema responsible as an accomplice for the killings of thousands at Kibuye, and for the crimes committed against civilians at the Trafipro roadblock. 🌐

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International Criminal Court Officially Established

On April 11, 2002, the International Criminal Court (ICC) officially was launched. The Rome Statute creating the ICC received more than the sixty ratifications required for its creation. At a UN ceremony on April 11, ten countries—Bosnia, Bulgaria, Cambodia, Congo, Ireland, Jordan, Mongolia, Niger, Romania, and Slovakia—deposited their instruments of ratification, bringing to sixty-six the number of states that have ratified the Rome Statute. The United States boycotted the April 11 ceremony. Further, the Bush Administration has maintained that it will refuse to seek Senate ratification of the Rome Statute and has threatened to nullify the U.S. signature. The ICC will be the first permanent court to try individuals accused of war crimes, genocide, and crimes against humanity. Its historic creation is the culmination of four years of negotiations and ratification proceedings worldwide. The Court will be based at The Hague, and the Rome Statute will officially enter into force on July 1, 2002. For more information about the ICC, visit the Coalition for the ICC website at www.iccnw.org. 🌐