

COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

Developments concerning the International Criminal Court and
other international criminal tribunals

**Information document
Prepared by the Secretariat**

53rd meeting
Strasbourg (France), 23-24 March 2017

Public International Law and Treaty Office Division
Directorate of Legal Advice and Public International Law, DLAPIL

DEVELOPMENTS CONCERNING THE INTERNATIONAL CRIMINAL COURT (ICC) AND OTHER INTERNATIONAL CRIMINAL TRIBUNALS

I. The International Criminal Court (ICC)

1. The Rome Statute of the International Criminal Court currently has 124 State parties. Since the last meeting of the CAHDI no new instruments of ratification, acceptance or approval were deposited.

2. The Governments of South Africa (notification of 19 October 2016), Burundi (notification of 27 October 2016) and The Gambia (notification of 10 November 2016) notified the Secretary-General of the United Nations of their decision to withdraw from the Rome Statute. In accordance with Article 127-1 of the Rome Statute such withdrawals shall take effect one year after the date of receipt of the notification. The Government of The Gambia notified its decision to rescind its notification of withdrawal on 10 February 2017. On 7 March 2017, the Government of South Africa notified the Secretary-General of the revocation of its notification of withdrawal from the Rome Statute after a national court (the North Gauteng High Court) had declared the decision to withdraw from the Rome Statute as unconstitutional and invalid on 22 February 2017.

3. In a communication received on 30 November 2016, the Government of the Russian Federation informed the Secretary-General of the United Nations of the intention of the Russian Federation not to become a party to the Rome Statute, which it had signed on 13 September 2000.

4. The two amendments to the Rome Statute of the International Criminal Court adopted at the Review Conference of the Rome Statute held in Kampala (Uganda) from 31 May to 11 June 2010, the so called “Kampala amendments”¹, were ratified by Chile and the Netherlands on 23 September 2016. Both amendments have now been ratified by 32 States in total.

5. The amendment adopted by the Parties at the 11th plenary meeting of the Assembly of States Parties to the Rome Statute on 26 November 2015 in The Hague (the Netherlands), to delete Article 124 of the Rome Statute (transitional provision with regard to the ICC’s jurisdiction concerning war crimes), shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited by seven-eighths of them. So far Norway (1 July 2016), Finland (23 September 2016) and Slovakia (28 October 2016) have deposited their instruments of acceptance with regard to this amendment.

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6. As regards the latest judicial activity at the ICC:

- On 21 September 2016, the Government of the Gabonese Republic transmitted to the Office of the Prosecutor a referral regarding the [situation in Gabon](#) since May 2016 in the context of the presidential elections held on 27 August 2016. On 29 September 2016, the Prosecutor announced the opening of a preliminary examination on the referred situation.
- On 27 September 2016, Trial Chamber VIII found Mr Ahmed Al Faqi Al Mahdi in the case of [The Prosecutor v. Ahmad Al Faqi Al Mahdi \(case no. ICC-01/12-01/15\)](#) in the situation of Mali guilty, as a co-perpetrator, of the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu, Mali, in June and July 2012. Mr Mahdi was sentenced to 9 years’ imprisonment. The Chamber indicated that the targeted buildings

¹ See the United Nations Treaty Collection at the following [link](#).

were regarded and protected as a significant part of the cultural heritage of Timbuktu and of Mali and did not constitute military objectives. They were specifically identified, chosen and targeted precisely in light and because of their religious and historical character. As a consequence of the attack, they were either completely destroyed or severely damaged. Their destruction was considered as a serious matter by the local population.

- On 19 October 2016, Trial Chamber VII found the five accused in the case of [*The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* \(case no. ICC-01/05-01/13\)](#) in the situation of the Central African Republic guilty of various offences against the administration of justice related to false testimonies of defence witnesses in another case before the ICC, [*The Prosecutor v. Jean-Pierre Bemba Gombo* \(case no. ICC-01/05-01/08\)](#). The Chamber shall pronounce the penalties on 22 March 2017. For these types of offences the judges may impose a term of imprisonment not exceeding five years and/or a fine. All the five convicted persons have appealed the judgment.
- On 6-7 December 2016, the trial in the case of [*The Prosecutor v. Dominic Ongwen* \(case no. ICC-02/04-01/15\)](#) in the situation of Uganda was opened before Trial Chamber IX. The Pre-Trial Chamber II had confirmed 70 charges against Mr Ongwen on 23 March 2016 and concluded that there were substantial grounds to believe that the accused had been responsible for several war crimes and crimes against humanity allegedly committed during attacks against four internally displaced persons camps from 2003 to 2004, as well as sexual and gender-based crimes committed by the defendant and crimes of conscription and the use of children under the age of 15 in hostilities allegedly committed between 1 July 2002 and 31 December 2005. The defendant had been serving as the Commander in the Sinia Brigade of the Lord's Resistance Army, when the arrest warrant was issued in July 2005. The defendant was subsequently surrendered to the ICC on 16 January 2015 and transferred to ICC custody on 21 January 2015.
- On 8 December 2016, Pre-Trial Chamber II issued a decision convening a public hearing on 7 April 2017, for the purposes of a determination on the compliance by the Republic of South Africa with the Court's request for arrest and surrender of Mr Omar Al Bashir² to the Court. The Chamber invited the Prosecutor, representatives of South Africa and representatives of the United Nations to attend the hearing, and to make, if they so wish, written submissions in advance of the hearing, by 17 March 2017. Considering that the issue is of general importance, the Chamber also invited any interested State Party to the Rome Statute, if they so wish, to make written submissions on the matter, by 24 February 2017. Despite the Court's request for arrest and surrender of Omar Al Bashir to the Court, South Africa did not arrest and surrender him while he was on its territory between 13 and 15 June 2015.
- On 22 February 2017, Trial Chamber II scheduled the delivery of the order for reparations to victims in the case [*The Prosecutor v. Germain Katanga* \(case no. ICC-01/04-01/07\)](#) for 24 March 2017. Mr Germain Katanga was sentenced, on 23 May 2014, to a total of 12 years' imprisonment after being found guilty, as an accessory, of one count of crimes against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging) committed on 24 February 2003 during the attack on the village of Bogoro, in the Ituri district of the Democratic Republic of the Congo. On 13 November 2015, three Judges of the Appeals Chamber reviewed Germain Katanga's sentence and decided to reduce it. On 19 December 2015, Germain Katanga was transferred to a DRC prison to serve his sentence, which he completed on 18 January 2016. Mr Katanga remains in a prison in the DRC due to national judicial proceedings against him relating to other alleged crimes.

² See, ICC, [*The Prosecutor v. Omar Hassan Ahmad Al Bashir* \(case no. ICC-02/05-01/09\)](#).

II. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the United Nations Mechanism for International Criminal Tribunals (MICT)

7. The latest developments at the International Criminal Tribunal for the former Yugoslavia (ICTY) and the United Nations Mechanism for International Criminal Tribunals (MICT) were as follows:

- On 2 May 2016, the Prosecution filed its notice of appeal against the ICTY Trial Judgement of 31 March 2016³ in the case of [*The Prosecutor v. Vojislav Šešelj \(case no. MICT-16-99\)*](#). The Trial Chamber III of the ICTY had acquitted the defendant, the President of the Serbian Radical Party and a former member of the Assembly of the Republic of Serbia, of all charges. The defendant had been indicted on 14 February 2003 and surrendered to the ICTY on 23 February 2003 for three counts of crimes against humanity and six counts of violations of the laws or customs of war from approximately August 1991 until September 1993 against the non-Serb population of Croatia, Bosnia and Herzegovina and the province of Vojvodina in the Republic of Serbia. In its judgment of 31 March 2016, the majority found that the prosecution had failed to prove the existence of a criminal purpose, a legal requirement for the joint criminal enterprise. The majority also found that the recruitment of volunteers through which the defendant had been deemed to participate in the joint criminal enterprise, had been a legal activity regulated by the Yugoslav constitution and other relevant laws at the time.
- On 22 July 2016, both parties filed their notices of appeal in the case of [*The Prosecutor v. Radovan Karadžić \(case no. MICT-13-55\)*](#) before the MICT Appeals Chamber after the Trial Chamber III of the ICTY, by judgement of 24 March 2016⁴, had convicted the defendant, the former President of Republika Srpska and Supreme Commander of its armed forces, of genocide, crimes against humanity and violations of the laws or customs of war committed by Serb forces during the armed conflict in Bosnia and Herzegovina from 1992 until 1995 and sentenced Mr Karadžić to 40 years' imprisonment. The Status Conference with regard to the appeal proceedings is set to take place on 6 March 2017.
- On 7 November 2016, the accused confidentially filed their Defence pre-trial briefs in the case of [*The Prosecutor v. Jovica Stanišić and Franko Simatović \(case no. MICT-15-96\)*](#) on retrial after the Prosecutor had filed its pre-trial brief on 5 September 2016. On 30 May 2013, Trial Chamber I of the ICTY found⁵, by majority, Stanišić and Simatović not responsible for committing the crimes alleged in the indictment through participation in a JCE, the alleged objective of which was the forcible and permanent removal of the majority of non-Serbs from large areas in Croatia and Bosnia and Herzegovina, and acquitted Mr Stanišić and Mr Simatović on all counts of the indictment. Following the Prosecution's appeal, the ICTY Appeals Chamber ordered on 15 December 2015 that the accused be retried on all counts of the indictment quashing the acquittals. The Appeals Chamber, by majority, found that the Trial Chamber erroneously failed to make findings on the existence and scope of a common criminal purpose shared by a plurality of persons prior to finding that the intent of the accused was not established. In so doing, the Appeals Chamber, by majority, found that the Trial Chamber erred in law by failing to adjudicate and provide a reasoned opinion on essential elements of JCE liability. The MICT has competence over retrials originating from the ICTY on or after 1 July 2013.
- The appeal hearing in the case of [*The Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić \(case no. IT-04-74\)*](#),

³ ICTY, [*Prosecutor v. Vojislav Šešelj*](#), case no. IT-03-67, Trial Judgement of 31 March 2016.

⁴ ICTY, [*Prosecutor v. Radovan Karadžić*](#), case no. IT-95-5/18, Trial Judgement of 24 March 2016.

⁵ ICTY, [*Prosecutor v. Jovica Stanišić and Franko Simatović*](#), case no. IT-03-69, Trial Judgement of 30 May 2013.

the ICTY's last and biggest-ever case before the Appeals Chamber, is scheduled to take place from 20 to 28 March 2017. The case concerns six high-level leaders of the Bosnian Croat wartime entity Herceg-Bosna and the Croatian Defence Council (HVO) who were convicted on 29 May 2013 by the Tribunal's Trial Chamber III for crimes against humanity, violations of the laws or customs of war, and grave breaches of the Geneva Conventions committed between 1992 and 1994 to sentences of 10-25 years of imprisonment.

III. The Extraordinary Chambers in the Courts of Cambodia (ECCC)

8. Since the last CAHDI meeting, the latest developments at the Extraordinary Chamber in the Courts of Cambodia (ECCC) were as follows:

- On 23 November 2016, the Supreme Court Chamber pronounced its judgement on appeals against the trial judgement in [Case 002/01](#) against Nuon Chea, former Deputy Secretary of the Communist Party of Kampuchea, and Khieu Samphan, former Head of State of Democratic Kampuchea. The Supreme Court Chamber upheld Nuon Chea's and Khieu Samphan's convictions for crimes against humanity of murder, persecution on political grounds and other inhumane acts in relation to the evacuation of Phnom Penh immediately after the fall of the city on 17 April 1975. In relation to the second phase of population transfers that occurred between 1975 and 1977, the Chamber affirmed the accused's conviction for the crime against humanity of other inhumane acts, and entered a conviction for the crime against humanity of murder. The Supreme Court Chamber reversed, however, the convictions entered by the Trial Chamber for the crime against humanity of extermination in relation to the evacuation of Phnom Penh and the second phase of population transfers. It found that the evidence before the Trial Chamber in relation to the population movements did not establish beyond reasonable doubt the requisite killings on a large scale committed with direct intent. In relation to the second phase of population transfers, the Supreme Court Chamber also reversed the Trial Chamber's convictions for the crime against humanity of persecution on political grounds, having found that the evidence had not established that the vast majority of evacuees had been "New People". As such, it had not been established that the transfers were, in fact, discriminatory. While the Supreme Court Chamber confirmed that at least 250 Lon Nol soldiers and officials had been executed at Tuol Po Chrey at the end of April 1975 and that therefore crimes against humanity had likely been committed, the evidence before the Trial Chamber was considered to be inadequate to reasonably substantiate a finding that, at the time of the events, there had been a policy to kill all Lon Nol soldiers. For that reason, the Supreme Court Chamber reversed the Nuon Chea's and Khieu Samphan's convictions for the crimes against humanity of extermination, murder and persecution on political grounds at Tuol Po Chrey. The Supreme Court Chamber did not consider that the fact that it found errors in some of the Trial Chamber's conclusions should lead it to revise the sentences imposed by the Trial Chamber but confirmed the life sentence imposed by the Trial Chamber for each of the accused as appropriate.
- On 16 December 2016, the Co-Investigating Judges ordered the severance of the proceedings against Ao An from [Case 004](#) and the creation of a new case file, 004/02. This concluded the over eight years of judicial investigation into *Case 004* against Ao An concerning genocide of the Cham and crimes against humanity including, *inter alia*, the persecution against the so-called "17 April people", former Lon Nol soldiers, people from the East Zone and other "internal enemies", committed between 17 April 1975 and 6 January 1979. The severance of the proceedings will allow bringing the proceedings against Ao An to a timely conclusion while continuing the investigations in the remainder of *Case 004*.

- On 10 January 2017, the International Co-Investigating Judge notified all parties in [Case 003](#) of the conclusion of the judicial investigation into Mr Meas Muth crimes alleged to have been committed between 17 April 1975 and 6 January 1979. The investigation that lasted over eight years was initiated on 7 September 2009. The judicial investigation against a previous joint suspect, Sou Met, was terminated on 2 June 2015 following his earlier demise.
- On 11 January 2017, the Trial Chamber concluded the evidentiary hearings in [Case 002/02](#), involving allegations of crimes against humanity, genocide, and grave breaches of the Geneva Conventions against the accused Mr Khieu Samphan and Mr Nuon Chea (the same as in Case 002/01 above). The Chamber commenced evidentiary proceedings on 8 January 2015 and heard during the 274 hearing days evidence on the topics of the Tram Kok Cooperatives (including Kraing Ta Chan Security Centre and the treatment of Buddhists), 1st January Dam Worksite, the Kampong Chhnang Airport Construction site, Trapeang Thma Dam worksite, the treatment of the Cham and the Vietnamese, the Au Kanseng, Phnom Kraol and S-21 security centres and internal purges, the regulation of marriage, nature of the armed conflict and, finally, the roles of the accused. The Trial Chamber adjourned the hearing until the Closing Statements on 5 June 2017.
- On 22 February 2017, the Co-Investigating Judges issued a joint closing order in the proceedings against Im Chaem in [Case 004/1](#). The case was dismissed due to lack of jurisdiction *ratione personae* of the ECCC over Im Chaem, who was neither a senior leader nor otherwise one of the most responsible officials of the Khmer Rouge regime.

IV. Special Tribunal for Lebanon (STL)

9. Since the last CAHDI meeting no new developments took place as regards the Special Tribunal for Lebanon (STL).