

## Housing, Land and Property Deprivation in the International Criminal Tribunal for the Former Yugoslavia (ICTY)

While the Nuremberg Trial and Tokyo Tribunal set the precedent for the international criminal prosecution of war crimes and crimes against humanity, including gross and serious violations of the HRAH, the UN Security Council and international community took a different approach to creating the rules and procedures of the ICTY.<sup>1</sup> Significantly, the Statute was procedurally innovative in that it established protection for witnesses, thereby making it possible for victims to participate in the trial phase by testifying. It also elaborated on the modes of responsibility attributable to the perpetrators of crimes; from command responsibility to planning, executing, aiding and abetting.<sup>2</sup> The statute of the Tribunal specifies its jurisdiction over violations of the Fourth Geneva Convention, violations of the laws and customs of war, crimes against humanity and genocide and it also specifies the constituent elements of these crimes.<sup>3</sup>

To date, the Tribunal has concluded proceedings against 121 alleged perpetrators out of 161 indictments. At present, one case is in pretrial, 24 are in trial stage, 14 are in the appeals phase, and two accused are still at large. The Tribunal is expected to wrap up its proceedings, including appeals, sometime in 2011.<sup>4</sup>

A prominent case involving serious violations of the HRAH is that of Mladen Naletilic and Vinko Martinovic, a.k.a. "Tuta" and "Stela," respectively, who were each indicted for grave breaches of the Geneva Conventions, violations of the laws and customs of war and crimes against humanity including: unlawful transfer of a civilian; wanton destruction not justified by military necessity; plunder of public or private property and persecutions on political, racial and religious grounds. Their trial commenced on 10 September 2001 and was concluded on 31 October 2002.<sup>5</sup>

Naletilic, hereafter Tuta, was the founder and commander of the Bosnian Croat "Kaznjenicka Bojna" (Convicts Battalion), consisting of 200-300 soldiers based around Mostar, in southeastern Bosnia and Herzegovina. Martinovic, hereafter Stela, was the commander of the "Mrmak" unit of the Convicts Battalion and was the subordinate of Tuta. Their trial covered the conflict between Bosnian Croats and Bosnian Muslims for the period beginning April 1993 to January 1994. These two ethnic groups previously had fought in cooperation on the same side in 1992 under the Croatian Defense Council (HVO) against the Serb-Montenegrin forces, sometimes referred to as the Yugoslav People's Army (JNA).

The Trial Chamber determined that there was a widespread and systematic attack against the

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<sup>1</sup> The Statute of the International Criminal Tribunal for Rwanda (ICTR) is almost identical to that of the ICTY as is its approach to victims, however, given the relevance of ICTY proceedings to the adjudication of violations of the HRAH, we will only focus on its proceedings.

<sup>2</sup> UN Security Council, *Statute of the International Criminal Tribunal for the former Yugoslavia*, Security Council resolution 827 (1993), 25 May 1993. Article 7.

<sup>3</sup> *Ibid.* Articles 2-5

<sup>4</sup> <http://www.icty.org/>

<sup>5</sup> Adapted from 'IT-98-34' Case Information Sheet, at: <http://www.icty.org/>

Muslim civilian population in the town of Mostar, as well as the towns of Solvici and Doljani at the time of Tuta and Stela's indictment. Bosnian Muslim homes in the area were burnt and mosques were systematically destroyed to prevent Muslims from returning. Mostar was attacked in May 1993 and following the hostilities groups of soldiers forcibly evicted Bosnian Muslim families out of their apartments at night and forced these families to leave all their possessions behind and move to the Eastern part of the town, which subsequently became overpopulated with forcibly displaced civilians. Water and electricity services were cut off, humanitarian organisations were denied access for weeks and other crucial public services, such as hospitals, were inaccessible because they were situated in the Western part of Mostar.

The Chamber concluded that Tuta and Stela intended to discriminate against the Muslim population. Tuta was responsible for the forced eviction and removal of approximately 400 Muslim civilians from Solvici and Doljani on 4 May. Through an operation he planned and conducted with a contingent of the Battalion known as Tuta's Men, civilians were detained and held in houses in another hamlet before they were transferred. On 9 May 1993, Stela was responsible for and was personally involved in rounding up the Muslim civilian population of Mostar and unlawfully transferring and detaining them at the Heliodrom. Women, children and the elderly were intimidated and forced out of their homes at gunpoint. Thereafter, the attackers looted many of the apartments.

Both Tuta and Stela were convicted for the looting of private property of Bosnian Muslims in Mostar, committed by troops under their command. Finally, the Chamber convicted Tuta for ordering the destruction of all Bosnian Muslim homes in Doljani on 23 April 1993.<sup>6</sup> They were sentenced to 20 years and 18 years imprisonment respectively.

In addition to the case of Tuta and Stela, no less than 12 other perpetrators were prosecuted and convicted for violations of the HRAH constituting war crimes and crimes against humanity, primarily, these violations were the destruction and plunder of property, destruction of institutions dedicated to religion or education and forcible transfer and deportation as both persecution and other inhumane acts.<sup>7</sup> The ICTY then continued and continues, in the vein of Nuremberg and Tokyo, successfully to enforce IHL and prosecute violations of the HRAH contained therein.

While the ICTY Statute's provisions for witness protection made victim participation theoretically possible, in practice, victims were not allowed to participate in their personal capacity within the criminal proceedings, nor were they entitled to receive reparations or compensation for damages suffered from the atrocities perpetrated against them. In effect, the Statute failed to address participation and reparation adequately, as its rules and procedures of evidence provided only limited guidance on these issues.<sup>8</sup>

The ICTY Statute's provisions for witnesses are focused on protection measures so that victims

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<sup>6</sup> *Ibid.* <http://www.icty.org/>

<sup>7</sup> See Annex for a compendium of relevant ICTY cases

<sup>8</sup> Cherif. M. Bassiouni, *Introduction to International Criminal Law* (New York: Transnational Publishers, 2003).

can participate in the trial phase by providing crucial testimony. As such, the participation of victims in the prosecution process is limited to this role and requires the victim to issue an explicit request to testify.<sup>9</sup> While the participation of victims as witnesses offers greater access to justice than was made available through Nuremberg, significant limitations remain even in this respect. As witnesses, victims are neither entitled to a lawyer, nor are they entitled to access any evidence presented throughout the trial. In fact, they may only speak in the context of examination or cross-examination and are not entitled to be kept informed of the progress of proceedings, despite their personal nature.<sup>10</sup>

The sentiments expressed by certain victims about the Nuremberg Trials—that their stories and experiences were not accounted for and not heard—led them to feel alienated from justice. Ultimately, the view prevailed that the retribution sought at Nuremberg was not for the satisfaction of the victims. It seems then that in some ways, the participation of victims as witnesses can limit their access to justice. In the context of the ICTY, the procedural necessity to restrict the interaction between the defense and prosecution counsels and witnesses for the sake of impartiality in effect limits the extent to which victims may actually be heard.<sup>11</sup> The ICTY then falls short of the restorative aspects of remedy outlined in the [Basic Principles for Remedy and Reparation](#), namely, satisfaction.

Concerning reparations, the ICTY Statute is quite clear. From its establishment, through Security Council Resolution 827, it was indicated that the sole purpose of the Tribunal was to “prosecute persons responsible for genocide and other serious violations of international humanitarian law...”<sup>12</sup> Its own mandate is then limited to retribution, however, the Statute’s RPE does acknowledge reparation and specifies the national jurisdictions in question as the appropriate venues for victims to seek this aspect of justice.<sup>13</sup> Reparations processes have occurred at the national level, independent of prosecution, in the form of administrative arrangements.

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<sup>9</sup> UN Security Council, *Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia*, 14 March 1994, IT/32, Rule 90.

<sup>10</sup> John Ackerman and Eugene O’Sullivan, *Practice and Procedure of the International Criminal Tribunal for the Former Yugoslavia: with Selected Materials from the International Criminal Tribunal for Rwanda*, Kluwer Law International, 2000.

<sup>11</sup> Marie-Benedicte Dembour and Emily Haslam, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, *European Journal of International Law*, 15, 2004, p.151

<sup>12</sup> UN Security Council, *Resolution 827 (1993)*, S/RES/827(1993), Preamble

<sup>13</sup> UN Security Council, *Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia*, 14 March 1994, IT/32, Rule 106(b) “Pursuant to the relevant national legislation, a victim or persons claiming through him may bring action in a national court or other competent body to obtain compensation.”