

Head of Office: Isabel Düsterhöft

Assistants: Hannah McMillen and Isabel Meyer-Landrut

Contributors: Katarina Bogojević, Matthew Lawson, Molly Martin, Katherine Mozynski, Maria Norbis, Jill Palmeiro, Ivana Petković, Cameron Smith, Claire Smith, Danielle Topalsky

Design: Sabrina Sharma

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ICTY CASES

Cases at Trial

Hadžić (IT-04-75)

Karadžić (IT-95-5/18-I)

Mladić (IT-09-92)

Šešelj (IT-03-67)

Cases on Appeal

Prlić *et al.* (IT-04-74)

Stanišić & Simatović (IT-03-69)

Stanišić & Župljanin (IT-08-91)

ICTY NEWS

Prosecutor v. Karadžić (IT-95-5/18-I)

A status conference was held in the case of *Prosecutor v. Karadžić* on 29 September. The Judges took appearances from the parties, including Radovan Karadžić, who is self-represented and was accompanied by his Legal Advisor, Peter Robinson.

Karadžić filed a request for a Status Conference on 1 September in order to discuss several matters including his health and detention conditions. During the conference, Karadžić informed the Tribunal that he has generally been treated very well by individual staff members of the Detention Unit management, but claimed that the detention system itself was responsible for his deterioration in physical health and the decline in health of other detainees.

In particular, Karadžić cited the quality of the food as a cause of the development of malignant diseases and diabetes among the detainees, stating that the food they received was frozen and then cooked in a microwave and had a detrimental effect upon the aging population of detainees. He noted that the incidence of disease among the population of detainees was very prominent for such a small sample of people and suggested that detention conditions contributed to this number. Karadžić suggested detainees should have access to a doctor on a daily basis so as to be properly diagnosed and preventatively treated against malignant disease in a timely manner.

Karadžić also claimed that the Tribunal should reconsider rules which do not allow detainees to have refrigerators, citing that a lack of refrigerators for detainees' use could be detrimental to those with special dietary requirements, such as vegetarians or people following religious dietary restrictions. Karadžić also mentioned that he was told that he should be able to receive an

ICTY AND MICT NEWS

- Karadžić: Status Conference
- Mladić: Defence Case Continues
- Kamuhanda: *Amicus Curiae* Briefs
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icebox for his personal use, but that this had not yet happened. He also stated that International Criminal Court (ICC) detainees were provided with better food and amenities.

The Judges inquired about his apparent weight loss and his exercise regimen, to which Karadžić replied that he is given enough opportunity to exercise and play tennis. The Judges also inquired about his recent surgery and requested that they be made aware of any

deterioration in his condition as soon as practicable. Karadžić maintained that he had contacted medical and detention personnel regarding his health and detention conditions. The Trial Chamber noted the continued importance of the Accused's health and detention conditions, but maintained that these issues fall outside of the purview of the Trial Chamber, suggesting that there are avenues of recourse available for Karadžić's complaints.

Prosecutor v. Mladić (IT-09-92)

On 15 September, Paul Conway, a former professional military officer from Ireland, testified in The Hague. He spent a portion of his military career in United Nations Military Observer (UNMO) positions, including at the UNMO mission in Bosnia and Herzegovina (BiH). He testified that while on duty at UNMO Observation Post 1 (PO1) on 28 August 1995 (the date of the Markale II market shelling), he heard several explosions around 1100 hours, the sound of which was muffled. He was unable to establish whether the explosions originated from outgoing or incoming fire and the sound was less loud than he would have expected. Because of the special acoustics in the city of Sarajevo, differentiating between incoming or outgoing fire during the siege was frequently unreliable. Therefore, Conway could not agree with the proposition that if someone on OP-1 did not hear the sound of outgoing fire that day, he would be able to conclude that the fire on Markale Market was coming from the Serbian side. In his opinion, that conclusion cannot be made with any certainty. Toward the end of his service, sometime in December 1995 or the beginning of January 1996, he found four Bosnian Army (ARBiH) mortars on the southern slopes of Sarajevo, in a sector in which the ARBiH had never before allowed access to UNMO patrols. These mortars were well fortified, protected by sandbags, and it looked as if they had been there for a long time. Their barrels were trained to the north, to the city of Sarajevo. They were within range and in the direction of Markale Market.

On 16 September, witness Radovan Popović gave testimony providing further evidence of Mladić's alibi relating to the Srebrenica part of the case. The witness is a professional journalist and was asked by a colleague, Biljana Djurdjević, to record her wedding, scheduled for 16 July 1995, with a video camera. He filmed the bride's preparation for the wedding, the arrival of the groom, Zarko, and the arrival of the best man and bridesmaid, Ratko and Bosilka Mladić. He subsequently filmed the ceremony at the church and

the reception. The witness testified that Mladić and his wife were constantly around and on camera. He filmed all the way up to 1700 hours when the VHS tape was filled, and then having agreed with the young couple to go and buy another VHS tape, he briefly left. When he returned to the restaurant to continue the filming, Mladić and his wife were no longer there.

The Defence continued with the evidence of a Canadian intelligence officer, referred to as GRMO37, who testified under protective measures on 17 September. The witness worked for the United Nations Protection Force (UNPROFOR) headquarters in Zagreb from November 1994 to July 1995. Two representatives from the Canadian Department of Defence were also in attendance to monitor the testimony in an effort to prevent any information from being disclosed against the interests of Canadian national security. The witness GRMO37 previously testified in Karadžić's trial and again gave similar evidence that the Bosnian Muslim side was shelling their own people in order to blame the Bosnian Serbs and receive international military intervention. GRMO37 gave evidence accusing the Bosnian Muslims of shelling Markale Market in February 1994. The witness recalled being shown a photograph by an American intelligence officer during a meeting which depicted a person throwing a mortar shell from a window. GRMO37 also provided evidence about the international observers present and how they collected intelligence information about Serb positions for the North Atlantic Treaty Organisation (NATO). He also testified about arms smuggling to the airport in Tuzla and the airport in Zagreb. On one such occasion a plane in Zagreb exploded. He further indicated that the Markale II shell in August 1995 had been registered by Cymbeline Radar, but that the Serb and Army of BiH sites were too close to determine who had fired the round.

The Mladić case continued on 21 September with Canadian military officer Michael Gauthier, who gave

testimony to the Tribunal via video link. In February 1994, Gauthier had been assigned to lead a United Nations investigation into the first shelling incident at Markale Market in Sarajevo. Prior to Gauthier's investigation, three separate incidents of crater analysis had taken place. The initial investigation was undertaken by a French battalion on the day of the explosion. Gauthier's team found that this team had used an unconventional method to determine the bearing of the shell and that this meant that their results were suspect. The French team had also chipped away at the hole to excavate the tail fin and thereby enlarged the crater.

Later on the day of the explosion, a second crater analysis was undertaken by United Nations staff member, Captain Verdy. Gauthier's team interviewed him and examined his report; however, the team concluded that he had made a mathematical error and therefore did not rely on his findings.

The third investigation was conducted by Major John Russell. Gauthier's team interviewed Russell and obtained a copy of his memorandum. However, they disproved his finding that the shell had hit a market stall before the explosion. Six days after the explosion, Gauthier's team conducted their own investigation into the crater. They attempted to measure the angle of descent, but due to the previous excavation of the crater and hole, the results were not sufficiently accurate to be used as a basis for a finding. The ultimate conclusion reached was that the mortar bomb in question could have been fired by either side in the

conflict.

Starting on 22 September and carrying on throughout the week, ballistics expert Zorica Subotić began her testimony providing information disputing the Prosecution's evidence for indiscriminate shelling of Sarajevo from 1992 to 1995. The witness analysed specific attacks that occurred in Dobrinja and concluded that the Army of the Republika Srpska (VRS) was not responsible for the shelling incidents; instead she maintains that the attacks were staged. The main focus of Subotić's testimony was the Markale Market incidents. The first incident on 5 February 1994 resulted in 66 deaths and 140 wounded persons. The second attack on 28 August 1995 killed 43 people and injured 75. Subotić and the Defence assert that neither of the shells came from the Bosnian Serb positions. Subotić explained that the large number of casualties were incompatible with the destructive properties of the type of shell in question. Subotić also noted the "unprofessional and improper" investigation of the incidents conducted by the Bosnian police. According to Subotić, the Bosnian side neglected to record crucial information such as the minimum angle of the incoming shell. She concluded that the shell that inflicted the damage on Markale Market was not launched from a specific side, but planted and activated while it was on the ground.



Zorica Subotić

MICT NEWS

Prosecutor v. Kamuhanda (MICT-13-33)

The previous edition of the ADC newsletter contains a comprehensive analysis of the *amici curiae* briefs submitted by the Association des Avocats de la Défense (ADAD) and the Association of Defence Counsel Practising Before the International Criminal Tribunal for the Former Yugoslavia and Representing Counsel Before the MICT (ADC-ICTY) in the case of *Prosecutor v. Kamuhanda* (MICT-13-33). The Prosecution's response to the issues raised in both *amici curiae* briefs will be addressed in the following paragraphs.

Both *amici curiae* briefs contain observations on the following three issues (see box on the right):

- (i) Does the conclusion of Kamuhanda's trial and appeal constitute a change of circumstances which warrants a reconsideration of the modalities for access for Kamuhanda's Counsel to interview Prosecution witnesses;
- (ii) If so, should access to interview a Prosecution witness, apart from consent from the witness, be at the discretion of Kamuhanda's Counsel or should access require a justification in relation to the particular witness to be approved by a Judge; and
- (iii) Should consultation of the witness as to the consent and the facilitation of the interview, if any, be conducted by the Prosecution or by the WISP?

Turning to the first issue, before addressing whether there has been a change of circumstances warranting the reconsideration of protective measures, the Prosecution submitted that the Single Judge sitting in the present case lacks jurisdiction to carry out any such reconsideration. Relying upon the Tribunal's own jurisprudence, the Prosecution claimed that only the Chamber that issued the original decision on protective measures has the authority to reconsider it.

Accepting, *arguendo*, that the Single Judge does have jurisdiction, the Prosecution claimed that the change of circumstances following the close of Kamuhanda's trial does not amount to a material change of circumstances to the extent that a failure to reconsider the original decision would amount to an injustice. It distinguished the cases cited by the ADAD and the ADC-ICTY, *inter alia*, on the basis that it was implicit within these decisions that the protective measures were only ever intended to be in place while the cases in which they were issued were at trial stage. In the present case, it considered that the underlying purpose of the order, which is to offer protection to witnesses whom may be at risk both during and after the trial, remains unchanged and thus does not warrant any reconsideration.

Related to the second observation, the Prosecution took the position that should the Single Judge decide that the change in circumstances required a change in the modalities for access by the Defence to Prosecution witnesses, then the Prosecution would consider that any request requires both justification and judicial approval. In support of this submission, while the Prosecution acknowledged that witnesses to crimes are neither the property of the Prosecution nor the Defence, it considered that the right to interview a witness should not be without limitations. Accordingly, the Prosecution refuted the Defence's position that

judicial approval for each interview be dispensed with. Any conclusion otherwise, it claimed, would be to permit Defence teams unfettered access to protected witnesses, including in circumstances which are not likely to advance the Defence's case materially. It concluded its second response by claiming that, while the protection afforded to witnesses must be seen in relation to the right of the Accused to a fair trial, in the present case Kamuhanda is not an Accused and his rights are therefore not subject to the same degree of consideration as would be the case if he was facing or awaiting trial.

The Prosecution's response to the final observation was that any inquiry as to the consent of the witness to be interviewed and the facilitation of the interview should be conducted by the Prosecution. The Prosecution claimed to be cognisant of the fact that Rule 86 (I) of the Mechanism for International Courts and Tribunals (MICT) does require that it falls to the Witness Support and Protection Unit (WISP) to carry out this task. However, it claimed that owing to the fact that Kamuhanda's motion is not filed pursuant to Rule 86(I), that ascertaining witness consent to be interviewed by the opposing party continues to reside with the Prosecutor. The Defence's contention that WISP should be the body tasked with determining the consent of persons benefiting from protective measures to be interviewed by the Defence should therefore be rejected. While the Prosecutor acknowledged that in the past there has been both actual bias and an appearance of bias on the part of the Prosecutor when obtaining witness consent to be interviewed, it claimed that this does not alter the fact that the Prosecutor should always be presumed to be acting in good faith and that the lack of any evidence to the contrary in the current case supports its position that the duty to obtain witness consent is a duty that should remain vested with the Prosecution.

Prosecutor v. Zelenović (MICT-15-89-ES)

On 15 September, President Theodor Meron issued the public redacted version of the 28 August decision in favour of the early release of Dragan Zelenović. Zelenović was a Bosnian Serb soldier and *de facto* military policeman in Foča, Bosnia and Herzegovina. He was arrested on 22 August 2005 and transferred to Bosnia on 8 June 2006. On 10 June 2006, Zelenović was transferred to the custody of the ICTY and detained in the United Nations Detention Unit in Scheveningen. The Office of the Prosecutor at the ICTY and Zelenović filed a motion for a plea agreement pursuant to Rule 62 *ter* of the ICTY Rules

of Procedure and Evidence. Moreover, on 17 January 2007, Zelenović pleaded guilty to seven counts of rape and torture as crimes against humanity pursuant to Article 7 of the ICTY Statute.



Dragan Zelenović

In accordance with his guilty plea, the ICTY sentenced him to 15 years in prison. After his appeal was

denied, he was transferred to Belgium in 2008 to serve the remainder of his sentence. Under Belgian law, a convicted person who has served one-third of their sentence is eligible for provisional release. Zelenović has served ten years, or two-thirds of his sentence, and is qualified for early release pursuant to Belgian domestic law. Nevertheless, the provisional release of a person convicted by the ICTY is a decision made by the President according to the MICT Statute and Rules.

The early release of Dragan Zelenović was contingent on the gravity of crimes, the eligibility and treatment of similarly-situated prisoners, demonstration of rehabilitation and cooperation with the Prosecution as

enshrined in Rule 151 of the MICT's Rules of Procedure and Evidence. The President concluded that the gravity of his crimes weighed against a decision for his early release, but successfully met the standards of the remaining criteria. As it applies to similarly-situated prisoners within the jurisdiction of the Mechanism, convicted persons having completed two-thirds of their sentence are eligible for early release. In addition, based on Custodial and Psycho-Social Reports from the prison, Zelenović conducted himself respectably as a detainee. Finally, with the entry of a guilty plea, Zelenović demonstrated cooperation with the Prosecution, which weighs in favour of his early release due to the pleas aiding in efficient administration of justice.

LOOKING BACK...

International Criminal Court

Ten years ago...

In October 2005, the ICC Prosecution unsealed its first arrest warrants. The warrants contained charges of war crimes and crimes against humanity committed in Uganda, and were issued for the five leaders of the armed group the Lord's Resistance Army (LRA), including Joseph Kony, the LRA's commander. At time of writing, only one of the Accused

was in ICC custody; two have deceased; and two, Joseph Kony and Vincent Otti, remain at large. Dominic Ongwen, alleged commander of the LRA Sinia Brigade, was surrendered to ICC custody and transferred to the United Nations Detention Unit in January 2015. His confirmation of charges hearing is scheduled for January 2016.

International Criminal Tribunal for Rwanda

Fifteen years ago...

On 23 October 2000, the Media Case at the ICTR (ICTR-99-52) opened. The three Accused, Ferdinand Nahimana and Jean-Bosco Barayagwiza (directors of *Radio Télévision Libre des Mille Collines*) and Hassan Ngeze (editor of *Kangura* magazine) were charged with counts of genocide, conspiracy to commit genocide, public incitement to commit genocide and complicity in genocide. The Media Case was the first of its kind at an international tribunal holding members of the media responsible for broad-

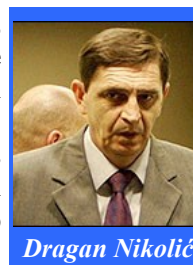
casts that were intended to inflame the public to commit acts of genocide. The case was appealed on a multitude of grounds by all three Defendants, including on violation of the right to a fair trial and that the Tribunal had overstepped its temporal jurisdiction. The Appeals Chamber, leaving much of the work of the Trial Chamber intact, affirmed the convictions for inciting genocide and clarified the boundary between hate speech and incitement to commit genocide.

International Criminal Tribunal for the former Yugoslavia

Twenty years ago...

On 4 October 1995, the first witnesses to testify in open court were called before the Trial Chamber of the ICTY in the *Prosecutor v. Dragan Nikolić*. Nikolić was also the first person to be indicted by the Tribunal in November 1994. Nikolić was the commander of a camp at Sušica and was charged with crimes against humanity, violations of the laws or customs of war and grave breaches of the Geneva

Conventions. In September 2003 Nikolić pleaded guilty to the charge of persecution on political, racial and religious grounds, murder, sexual violence and torture. He was sentenced to 23 years by the Trial Chamber, which was reduced to 20 years on appeal.



Dragan Nikolić

NEWS FROM THE REGION



Bosnia and Herzegovina

Former Member of HVO Military Police Indicted Following his Extradition From the United States

On 30 September, the State Prosecution in Bosnia and Herzegovina (BiH) indicted Almaz Nezirović, a former member of the Croatian Defence Council's (HVO) Military Police with the 103rd Derventska Brigade. The Prosecution alleges that from April to July 1992, Nezirović participated in the torture and inhumane treatment of Serb civilians in the Rabić and Silos Polje detention camps (Derventa) and the Tulek detention camp (Bosanski Brod).

Nezirović had been living in Roanoke, Virginia (US) since 1997. In a separate case in 2011 in the Western District of Virginia (US District Court), Nezirović was indicted for a number of offences related to naturalisation fraud for giving false statements and omissions when applying for US citizenship. Proceedings to extradite Nezirović to BiH commenced in July 2012 and, following several hearings and an appeal to the Fourth Circuit Court of Appeals (US), Nezirović was extradited to BiH in July 2015. During the extradition proceedings, the District Prosecution in Doboj conducted an investigation into Nezirović's suspected crimes in 1992 and now alleges that he beat detainees who were unlawfully detained with various tools and objects and deprived them of food. The indictment has been filed with the Court of BiH for confirmation.



Croatia

Trial of Five Members of the Croatian Military Police Begins

The trial in the so-called "Lora 2" case began on 9 September at the Split Country Court (Croatia). Tomislav Duić and Tonči Vrkić (Commander of the Lora Military Prison in Split (Croatia) and his Deputy, respectively) and Ante Gudić, Anđelko Botić, and Emilio Bungur (all military policemen) are accused of war crimes committed against Yugoslav People's Army (JNA) prisoners of war and Serb civilians at the Lora Military Prison in 1992, including the killing of three prisoners. Bungur was arrested in August after being on the run since 2005. Duić, the Commander of the camp, has been a fugitive for eleven years and is being tried *in absentia*.

This is the second of three "Lora" cases. The first, "Lora 1", saw the conviction of these Accused plus three other military policemen for two murders in 1992, with sentences ranging from six to eight years in 2007; Duić and Bungur were convicted and sentenced *in absentia* in that case. The families of the victims were awarded compensation and Croatia, in turn, filed to recover €460,000 from the "Lora 1" Accused in June 2015. During the investigation and prosecution of these cases there has been significant cooperation between Prosecutors in Split and Belgrade. The "Lora 3" case is still under investigation but focuses on suspected war crimes committed against primarily Montenegrin members of the JNA.



Serbia

Serbs Plead not Guilty to Crimes Against Kosovo Albanians in 1999

In February 2014, twelve former Yugoslav Army (VJ) troops were convicted for killing 118 Kosovo Albanians in Peć/Peja in 1999 and sentenced to an aggregate of 106 years. However, the Court of Appeals in Belgrade annulled the verdict because it was "incomprehensible and contradictory" and remanded the case for retrial. In the retrial proceedings, in which the twelve members of the Yugoslav Army's 177th Intervention Squad are accused of torture, looting, and of killing 118 Kosovo Albanians, all accused plead Not Guilty in the Special Court in Belgrade on 18 September. No trial date has been released.

NEWS FROM OTHER INTERNATIONAL COURTS



Extraordinary Chambers in the Courts of Cambodia

Beth Waterfall, Legal Intern, Nuon Chea Defence Team

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Judicial Update

Trial Proceedings in Case 002/02

In addition to participating in the daily trial hearings in Case 002/02, the Nuon Chea Defence filed several motions and responses before the Trial Chamber (TC): i) it responded to the Civil Party Lead Co-Lawyers' request for the TC's clarification on the scope of the examination of a civil party; ii) it requested for an additional witness to be summonsed in relation to the Trapeang Thma Dam worksite; iii) it responded to the International Co-Prosecutors' (ICP) request for additional witnesses in relation to the treatment of Cham people; and iv) it requested the TC to expedite the appearance of two witnesses and summons four more in relation to the treatment of Cham people.

Throughout September, the Khieu Samphân team continued to attend and participate in the hearings of Case 002/02. They have filed several submissions, all related to the ICP disclosure, in the ongoing Case 002/02 trial, of massive amounts of material from the confidential investigations underway in Cases 003 and 004. According to the Khieu Samphân team, the ICP must disclose only exculpatory material and prior statements of individuals called by the Trial Chamber and the fact that the ICP maintains that he must disclose "relevant material, whether inculpatory or exculpatory" amounts to an interference with the administration of justice.

Appeal Proceedings in Case 002/01

The Nuon Chea Defence filed its sixth request for additional evidence in relation to the Trial Judgement of Case 002/01 before the Supreme Court Chamber (SCC), requesting that the SCC admit 22 pieces of new evidence and summons two additional witnesses. The Nuon Chea Defence also filed a request for investigation into the events described in witness Sam Sithy's in-court testimony.

The Khieu Samphân Defence has also informed the Trial Chamber that they will need time (without any hearing in Case 002/02) to prepare the appeal hear-

ings in Case 002/01 when their dates will be announced.

Case 003

The Meas Muth Defence team in Case 003, during the month of September, filed two annulment applications to the Co-Investigating Judges, requesting the removal of procedurally defective investigative material from the Case File. It also filed another request and two letters to the Co-Investigating Judges, all of which have been classified as confidential. Before the Pre-Trial Chamber, the Meas Muth Defence filed one appeal and a related notice, also classified as confidential. The team continues to review material on the Case File and to prepare submissions to protect Meas Muth's rights and interests.

Case 004

In September, the Defence team for Ao An filed an application to seize the Pre-Trial Chamber with a view to annulment of investigation in a crime site. Further, the team continues to review the evidence in the Case File and to work on submissions to further prepare its client's defence and safeguard his fair trial rights.

Also in Case 004, the Defence team for Im Chaem filed confidential observations to the Co-Investigating Judges, at the latter's request. The team also filed another confidential submission to the Co-Investigating Judges on a separate issue. Further, the Defence team continues to review the evidence in the Case File and to prepare submissions to protect Im Chaem's fair trial and procedural rights.

Lastly, the Defence team from the final Named Suspect in Case 004 continued to monitor proceedings in Case 002/02. It continued to assert that the use of documents from Case 004 in proceedings before the Trial Chamber in Case 002/02 constitutes a violation of the Named Suspect's rights. The team continued to work to ensure its clients fair trial rights are protected.



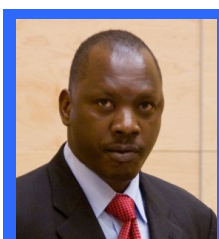
International Criminal Court

Aimel Yousfi-Roquencourt, Consultant, Office of the Public Counsel for the Defence

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Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04-01/06-3173)

On 22 September, pursuant to the review of sentence conducted under Article 110(3) of the Statute, the Appeals Chamber decided against Thomas Lubanga's early release and provided for another review of his sentence in two years from the issuance of this decision, as provided for by Article 110(5) of the Statute and Rule 224(3) of the Rules of Procedure and Evidence.



Thomas Lubanga
Dyilo

Lubanga was sentenced to 14 years imprisonment after being convicted for the crimes of conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities. His sentence was imposed on 10 July 2012 and confirmed on appeal on 1 December 2014. On 16 July,

Lubanga had served two thirds of his sentence and the Court therefore proceeded to the review of his sentence pursuant to Article 110(3) and according to the framework set out under Article 110(4) of the Statute and Rule 223 of the Rules of Procedure and Evidence.

The Panel found neither of the requirements provided for in Article 110(4)(a) and (b) to be met as it found that no information was presented regarding respectively "the early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions" or "the voluntary assistance of the person in enabling the enforcement of the judgments and orders of the Court in other cases". As to the first requirement, the Panel underlined

the fact that cooperation should have additional "post-sentence impact on the Court's investigations or prosecutions". As to "the other factors" provided for in Article 110(4)(c), referring to the ones listed in Rule 223 of the Rules of Procedure and Evidence, the Panel found only the requirements within the meaning of Rule 223(b) and (c) to be met in favour of the early release of Lubanga. Respectively, the Judges found that Lubanga has a prospect of resocialisation and successful resettlement as he has had regular contact with his family and has taken "steps to arrange to be a postgraduate student following his incarceration", and found no indication "that the detainee early release would give rise to significant social instability".

However, the Judges found none of the subparagraphs (a), (d) and (e) to be satisfied. The Appeals Chamber found "no indication that Lubanga's conduct while in detention show[ed] a genuine dissociation from his crimes" within the meaning of Rule 223(a), and that no significant action for the benefit of the victims, as is required by Rule 223(d), was undertaken by Lubanga. Regarding the last requirement of Rule 223(e) the Panel "determine[d] that there [were] no individual circumstances which should be taken into consideration" and dismissed Lubanga's argument pertaining to the fact that "a reduction of sentence should serve as a remedy for alleged violations of his human rights that occurred prior to and during the trial proceedings" on the ground that it "is not reflected in either Article 110(4) or Rule 223". In the absence of more factors in favour of the early release of Lubanga, the Panel found that his release was not warranted.

Prosecutor v. Germain Katanga (ICC-01/04-01/07)

The review of the sentence of Germain Katanga, sentenced to twelve years imprisonment in May 2014 is also pending as Katanga served two thirds of

his sentence on 18 September 2015. The review hearing took place on 6 October 2015, an update on its outcome is forthcoming in the following issue.

Training on Evidence Matters at the ICC

On 18 September, Verwiel & Van der Voort, in cooperation with the Office of Public Counsel for the Defence (OPCD), hosted a half-day training on Evidence Matters at the International Criminal Court (ICC). More than 40 participants gathered at the ICC to hear two panels constituted of Defence Counsel practicing before the ICC and other Tribunals. The panellists shared their experiences and discussed jurisprudential developments and best practices pertaining to the legal requirements and practical aspects of defence investigations, as well as the challenges of investigating complex forensic evidence and eviden-

tiary matters arising with privileged materials. Following the panels, the International Bar Association (IBA) presented and explained its new eyeWitness project, a mobile application designed to take photos and/or record video footage and submit the information to a virtual evidence locker (for more information see: <http://www.eyewitnessproject.org/>). Overall, the afternoon provided a fantastic opportunity to reflect on evolving areas of evidence with experienced professionals on the cutting edge of issues that are vital to Defence work in international criminal law.

DEFENCE ROSTRUM

Criminal Responsibility of Legal Persons in the Special Tribunal for Lebanon

By Matthew Lawson

On 18 September, Judge Nicola Lettieri at the Special Tribunal for Lebanon (STL) issued his judgment in the Contempt Case against two Accused: (1) *Al Jadeed TV*, a television broadcasting company headquartered in Beirut, Lebanon; and (2) *Kharmah Mohamed Tahsin Al Khayat*, Deputy Head of News and Political Programmes at *Al Jadeed TV* (STL-14-05). The decision is ground-breaking in that it is the first instance in the history of international justice that a legal person has been accused of a crime. Before this case, international law had exclusively applied an ancient principle expressed in Latin as *societas delinquere non potest*. In essence, only “natural persons” can be charged with crimes.

The case concerned a series of television broadcasts that purported to reveal the identity of Tribunal witnesses in the *Ayyash et al.* case (STL-11-01), regarding the attack on the former Lebanese Prime Minister Rafiq Hariri and others on 14 February 2005. In the Amended Order *in lieu* of Indictment, the *Amicus Curiae* Prosecutor, Kenneth Scott, alleged that Khayat had instructed a reporter to investigate and prepare a report on purported confidential witnesses. This report was then broadcast as a series of episodes on *Al Jadeed TV* on 6, 7, 9 and 10 August 2012. The episodes were then reportedly transferred to *Al Jadeed TV*'s website, where they remained at least until 4 December 2012, and to *Al Jadeed TV*'s YouTube channel where they remained accessible to the public at least until 31 January 2014.

On 10 August 2012, in response to the initial broadcasts, the Pre-Trial Judge issued an order directing *Al Jadeed TV* and its employees to cease the dissemination of this material; however, it was alleged that, despite having the authority to do so, Khayat failed to remove the episodes from the website or the YouTube channel.

Both *Al Jadeed TV* and Khayat were charged with two offences. Firstly, ‘Count 1’, that under Rule 60 *bis* (A), the Accused knowingly or willingly interfered with the administration of justice by broadcasting and/or publishing information on purported witnesses in the *Ayyash et al.* case, thereby undermining the public confidence in the Tribunal’s ability to protect the confidentiality of information about, or provided by, witnesses or potential witnesses. Secondly, ‘Count 2’, that under Rule 60 *bis* (A) (iii), the Accused knowingly or willingly interfered with the administration of justice by failing to remove from *Al Jadeed TV*'s website and its YouTube channel information on purported confidential witnesses in the *Ayyash et al.* case, thereby violating the 10 August 2012 Order of the Tribunal’s Pre-Trial Judge in this respect.

In relation to ‘Count 1’, Judge Lettieri found that the information provided in the episodes did allow for the identification of three of the individuals concerned. The witnesses that testified, stated that they had been afraid or concerned about the airing of the episodes; however, crucially, Judge Lettieri found that their fears or concerns were not based on ascertainable

facts that could objectively be linked to the disclosures and, further, that the witnesses had not provided evidence that their confidence in the Tribunal had been undermined, each requisite elements of ‘Count 1’. Consequently, both Accused were found not guilty.

In relation to ‘Count 2’, focusing first on Khayat, Judge Lettieri found that the Accused had the ability to remove the broadcast but had failed to do so until 2 October 2013, thereby fulfilling the *actus reus* of the offence. Further, he found that, at the very least, Khayat had been “wilfully blind” to the Order, thereby fulfilling the *mens rea* element. Khayat was consequently found guilty and fined €10,000 in a sentencing hearing on 28 September 2015.

Judge Lettieri then addressed the important issue of the criminal liability of the corporate Accused, *Al Jadeed TV*. This aspect of the case comes as a result of a fascinating exchange between the then President, Judge David Baragwanath and Judge Lettieri. Initially, on 31 January 2014, Judge Baragwanath, sitting as the Contempt Judge, issued the Contempt Decision in which he found that, whereas the STL’s primary jurisdiction (dealing with the Lebanese crimes of terrorism, offences against life and personal integrity, illicit associations and failing to report crimes and offences) only extended to “natural persons”, the Tribunal’s jurisdiction to punish contempt extended to “legal persons”. In reaching this controversial conclusion, he noted that the provisions regarding the Tribunal’s primary jurisdiction made use of “gendered language” such as the use of “him or her”, thereby excluding corporations. However, in contrast, in relation to the Tribunal’s “inherent jurisdiction”, the provisions relating to the punishment of contempt use the term “any person”. This, he concluded, encompasses “legal persons”. Judge Baragwanath supported his reasoning by noting a “general trend in most countries towards bringing companies to book”.

In his response, Judge Lettieri disagreed with Judge Baragwanath and dismissed the charges against the corporate defendant. He argued, *inter alia*, that the spirit of the STL’s statute was limited to natural persons, that there is no reference to an “it” anywhere in the STL statute, and that there is no general consensus in domestic legal systems that would permit the interpretation of “person” to include legal persons.

Judge Lettieri was subsequently overturned by the Appeals Chamber on 2 October 2014. Judge Janet Nosworthy and Judge Ivana Hrdličková, in the majority, surveyed many domestic jurisdictions and argued

that corporate criminal liability was “on the verge of attaining...the status of a general principle of law applicable under international law”. They also cited Article 210 of the Lebanese Criminal Code which itself provides for criminal liability for corporations. This decision was seen as “ground-breaking” but “questionable”, and had the potential to open the door to an international law of corporate criminal liability, potentially affecting other international tribunals and also perhaps impacting on the jurisdiction of Tribunals over crimes other than merely contempt. Consequently, Judge Lettieri’s decision on the liability of *Al Jadeed* was much anticipated. What form would this international law of corporate criminal liability take?

Despite initially disputing the Tribunal’s jurisdiction, Judge Lettieri was nonetheless placed in the position of having to declare the law. Perhaps with a hint of resistance, he first noted that the Appeals Chamber had provided him with “no clear guidance as to the applicable material elements in attributing liability to legal persons charged with contempt before the STL”. He stated that “there is no relevant international convention on the elements of corporate responsibility, nor international custom or general principles of law (there is indeed nothing approaching a universal model of consensus across national systems) on which I can rely”. He asserted that State practice varied significantly and that, consequently, any attempt to synthesise these systems would be highly selective and simplistic at best. He concluded that such a course of action would result in a “hodgepodge of elements that among other things could not reasonably have been foreseeable by the Accused at the time of the alleged acts and conduct”.

Amicus Curiae Prosecutor, Kenneth Scott, invited Judge Lettieri to recognise the existence of an international law of corporate criminal responsibility that attributed the acts or omissions of a “corporation’s principals, employees agents and/or affiliates” to the corporate entity. He argued that the elements he proposed were “common to nearly every model of corporate liability, including that of Lebanon”. In his view such persons must have: “(1) acted within the scope of their employment; (2) had authority on behalf of the corporation; and (3) acted on behalf of the corporation. Purely private acts and acts outside of the scope of a person’s agency would not be attributable to the corporation”.

However, Judge Lettieri chose not to apply this formulation and ultimately declared that it was “most

appropriate” to look at the Lebanese law on corporate liability. He arrived at this decision due to the fact that *Al Jadeed TV* is a Lebanese corporation and that, consequently, it was foreseeable that certain conduct might give rise to corporate liability. Judge Lettieri also noted that Lebanon is where the acts and conduct in this case occurred and, more broadly, is “at the heart of the Tribunal’s mandate”. In this respect, he declined to take the monumental step of declaring the existence of an international law of corporate criminal responsibility.

Accordingly, summarising Article 210 of the Lebanese Criminal Code, Judge Lettieri found that to prove corporate responsibility, it was necessary to (1) establish the criminal responsibility of a specific natural person, but that a conviction of the natural person is not required; (2) demonstrate that, at the relevant time, such natural person was a director, member of the administration, representative (which means someone authorised by the legal person to act in its name) or an employee who has been provided by the legal body with explicit authorisation to act in its name; and (3) prove that the natural person’s criminal conduct was done either (a) on behalf of or (b) using the means of the corporate Accused.

Applying the law to the facts, the first limb of the test

was satisfied since Khayat had been found to be criminally liable. However, when looking at the second limb of the test, Judge Lettieri found that, despite her managerial competencies within the company’s news department, it could not be concluded beyond reasonable doubt that Khayat qualified as a representative or duly authorised agent of *Al Jadeed TV*. Accordingly, *Al Jadeed TV* was found not guilty under ‘Count 2’. Judge Lettieri did not consider the third limb of the test.

On the one hand, the Contempt Case is groundbreaking in that it represents the first case in the history of international justice that a legal person has been accused of a crime. However, on the other hand, Lettieri’s decision is less sensational than it could have been. By refusing to declare an international law of corporate criminal liability and, instead, merely applying Lebanese law, the effects of Judge Lettieri’s decision will seemingly only be felt at the STL itself and will be restricted to matters involving contempt. Thus, questions continue to exist as to the substance of an international law or corporate responsibility, if, indeed, one exists at all. Further, it remains to be seen whether the STL’s jurisdiction over legal persons will remain restricted to matters of contempt, or whether this will be expanded to include crimes under its primary jurisdiction.

Gender Parity in International Justice

By Katarina Bogojević

While the female gender currently represents just over 50% of the world’s population, only 17% of the judges in major international tribunals are women. According to Viviana Krstićević, the lack of gender equality, or ‘parity’, in the international legal sphere is unjust. Krstićević is the Executive Director of the Non-Profit Centre for Justice and International Law (CEJIL). CEJIL is an organisation that fights for human rights by strategically using the tools of international human rights law. Currently, the organisation is working with the Gender Equal Campaign (GQUAL) – an organisation that is trying to remedy the under-representation of women in the justice system. These organisations are working together on a global campaign to promote parity in international representation.

While it may seem to many that we have come a long way from the times when women were considered to be the property of men, gender equality still has a long way to go. The lack of gender parity in international courts and tribunals is evidence that women do

not have equal opportunities in accessing these spaces and that the female perspective is not adequately being represented. Only four of the 106 judges of the International Court of Justice (ICJ) have been women in its 70 year history. This lack of female voices takes away an important perspective from these courts and tribunals. The decisions that these courts and tribunals make are intended to be applied to a global context. However, without adequate female representation, one could argue that international bodies are lacking legitimacy.

GQUAL’s approach to this issue is targeted at international tribunals and monitoring bodies. While they admit that these are very small and discrete forums, they are also very important ones. It is in these spaces that seminal decisions are being made, and it is from these spaces that women’s voices are absent.

The campaigns’ tactic is to work through governments. They want governments to commit themselves to strategically nominating and voting with gender

parity in mind. For example, if a government has the option of nominating ten positions, they need to anticipate that five of them should be women and five of them should be men. In order for these measures to be effectively implemented, the organisation states that there needs to be improved and more transparent selection processes, a better understanding of the effects of under-representation of women, and the gathering of an engaged global network.

Some would argue that this is an arbitrary position which has the potential to take away positions from

more qualified male candidates in order to create the “appearance” of equality. However, GQUAL states that the purpose is to ensure that qualified female candidates have equal access to these positions. Additionally, beyond qualifications, women candidates present a unique life perspective that the organisation argues needs to be voiced. By giving international courts and tribunals a female “twist”, the hope is that that there will be a positive trickle down effect, leading to greater gender equality in other professional and personal spheres.

Just Peace Weekend in The Hague

By Jill Palmeiro



Peace Palace, The Hague

From 19 to 21 September, The Hague hosted its second annual Just Peace Festival during a weekend of various activities celebrating peace and justice in honour

of the International Day of Peace. The Hague is the International City of Peace and Justice, home to a wealth of international organisations which participated in the weekend’s activities by opening their doors to the public during The Hague International Open Day.

The programme for the Just Peace Weekend included several activities such as music, workshops, exhibitions, a ‘Peace Run’, speakers, debates and the World Press Photo exhibition in the Atrium of The Hague’s City Hall. On 20 September, the largest international organisations opened their doors to the public for one day during the International Open Day, giving people the opportunity to learn more about the various forms of jurisdiction and international security and to visit organisations such as the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY), Eurojust, the International Court of Justice (ICJ) and the Organisation for the Prohibition of Chemical Weapons (OPCW).

Throughout the Open Day, the ICTY received around 700 members of the public. The event was opened by the ICTY Vice President Judge Carmel Agius, followed by presentations on the Role of International Judges at the ICTY by Judges Christoph Flügge and Alphons Orie. Other activities at the Tribunal included various presentations on the work of the ICTY and

the Mechanism for International Courts and Tribunals (MICT), guided courtroom tours, access to material from the ICTY archives and documentary film screenings.

The Just Peace Weekend is held every year in honour of the United Nations International Day of Peace, which is observed around the world on 21 September. In 1981, the United Nations General Assembly adopted resolution 36/67, which established the International Day of Peace in order to coincide with its opening session held annually on the third Tuesday of September. The purpose behind this resolution was to create a day devoted to strengthening the ideals of peace, both within and among all nations and people. The first official Peace Day took place the following year in September 1982. Later, in 2001, the General Assembly adopted resolution 55/282 by unanimous vote, establishing 21 September as the day of non-violence and ceasefire. During this day the United Nations invites all nations and people to honour the cessation of hostilities and commemorate the day through education, activities and public awareness on peace-related issues.

Every year the International Day of Peace has a theme and for 2015 the theme was “Partnerships for Peace – Dignity for All”. This year’s theme aimed to emphasise the importance of all groups of society working together to strive for peace, and reflects on the important advances that global society has made towards achieving peace since the establishment of the United Nations.

“I call on all warring parties to lay down their weapons and observe a global ceasefire. To them I say: stop the killings and the destruction, and create space for lasting peace.” UN Secretary-General Ban Ki-Moon, said in relation to Peace Day.



ADC-ICTY Conference on the Situation of Defence Counsel at International Criminal Courts and Tribunals

Date: 5 December 2015

Time: 9:00 - 17:30

Location: Bel Air Hotel, The Hague

Registration: adcicty.events@gmail.com

Fee: 35 Euros (*including coffee breaks*)

(20 Euros for ADC-ICTY members, students and unpaid interns)

Lunch: 15 Euros per person (*upon reservation*)

This one-day conference will focus on the situation of Defence Counsel at International Criminal Courts and Tribunals and will feature a keynote speaker and four distinguished panels on various topics in relation to the role and importance of the Defence.

The Keynote Speech, entitled *No Justice Without Defence Counsel*, will be delivered by Judge Prof. Dr. h.c. Wolfgang Schomburg, and Closing Remarks will be delivered by ADC-ICTY President, Colleen M. Rohan. Panelists include renowned Defence Counsel, Judges and representatives from various international criminal courts and tribunals.

It is possible to obtain credits for continuing legal education purposes.

Join us for the **ADC-ICTY's Annual Drinks and Christmas Party**
at Hudson's Bar & Kitchen in The Hague on 5 December 2015
from 8 PM onwards.

For further information please contact the ADC-ICTY Head Office at:
adcicty.events@gmail.com and visit [http://adc-icty.org/home/opportunities/
annual%20conference.html](http://adc-icty.org/home/opportunities/annual%20conference.html)



ADC-ICTY Conference Programme

5 December 2015 - Bel Air Hotel, The Hague

09:00 - 09:15 Keynote Speech – *No Justice Without Defence Counsel*

Judge Prof. Dr. h.c. Wolfgang Schomburg

09:15 - 10:45 Panel 1 - *The Role of Defence Counsel at International Criminal Courts and Tribunals*

Moderator: Christopher Gosnell

Panelists: Slobodan Zečević

Judge Alphons Orie

Judge Janet Nosworthy

11:15 - 12:45 Panel 2 - *The Necessity of a Defence Office from the International and National Perspective*

Moderator: Jens Dieckmann

Panelists: Héleyn Uñac

Xavier-Jean Keïta

Nina Kisić

13:45 - 15:15 Panel 3 - *The Importance of a Bar Association for International Criminal Courts and Tribunals*

Moderator: Slobodan Zečević

Panelists: Colleen Rohan

Fiana Reinhardt

Michael G. Karnavas

15:45 - 17:15 Panel 4 - *The Future of Defence Counsel on the International and National Level*

Moderator: Dragan Ivetić

Panelists: Gregor Guy-Smith

Judge Howard Morrison

Novak Lukić

17:15 - 17:30 Closing Remarks – Colleen Rohan

For further information and to register for this conference, please visit: <http://adc-icty.org/home/opportunities/annual%20conference.html> or send an email to adcicty.events@gmail.com

BLOG UPDATES AND ONLINE LECTURES

Blog Updates

Matt Howell, “**Why we Should Thank Defence Attorneys for Defending Criminals**”, 28 August 2015, available at: <http://tinyurl.com/q5hrsyy>

Julien Maton, “**Alleged Islamic Extremist Surrendered to the ICC for the Destruction of Historical Documents**”, 26 September 2015, available at: <http://tinyurl.com/pp2lvq7>

Michael G. Karnavas, “**Attorney-Client Privilege, Part III: International Tribunals**”, 7 October 2015, available at: <http://tinyurl.com/puwjah4>

Online Lectures and Videos

“**Monopolising Global Justice: International Criminal Law as a Challenge to Human Diversity**” by Sarah Nouwen, 2015, available at: <http://tinyurl.com/pdn379p>

“**The Principle of Mutual Recognition in the EU’s Area of Freedom, Security and Justice**” by Judge Koen Lenaerts, 2015, available at: <http://tinyurl.com/pdn379p>

“**Transitional (In)Justice in Israel/ Palestine**” by Nimer Sultany, 2015, available at: <http://tinyurl.com/qhbk74a>

PUBLICATIONS AND ARTICLES

Books

Jean Pierre Fofe Djofia Maewa. **L’administration de la preuve devant la Cour pénale internationale - Règles procédurales et méthodologiques**. Editions L’Harmattan (2015).

Nicola Palmer. **Courts in Conflict. Interpreting the Layers of Justice in Post-genocide Rwanda**. Oxford University Press, 2015.

John Roth. **The Failures of Ethics. Confronting the Holocaust, Genocide, and Other Mass Atrocities**. Oxford University Press, 2015.

Bruce Zagaris. **International White Collar Crime, 2nd edition**. Cambridge University Press, 2015.

Articles

Victor Kattan (2015). “**Decolonising the International Court of Justice: The Experience of Judge Sir Muhammad Zafrulla Khan in the South West Africa Cases**”. Asian Journal of International Law, Volume 5, Issue 2.

Hisashi Owanda (2015). “**Problems of Interaction Between the International and Domestic Legal Orders**”. Asian Journal of International Law, Volume 5, Issue 2.

Federica Paddeu (2015). “**Ghost of Genocide Past? State Responsibility for Genocide in the Former Yugoslavia**”. The Cambridge Law Journal, Volume 74, Issue 2.

Abdulqawin A. Yusuf (2015). “**From Reluctance to Acquiescence: The Evolving Attitude of African State Towards Judicial and Arbitral Settlement of Disputes**”. Leiden Journal of International Law, Volume 28, Issue 3.

CALLS FOR PAPERS

The Institute Barcelona D’Estudis Internacionals has issued a Call for Paper for its fourth edition of the Barcelona Workshop on Global Governance. Submissions from all disciplines are welcome.
Deadline of submission: 21 October 2015 More Info: <http://tinyurl.com/oovgzp>

The Danish National Research Foundation has issued a Call for Papers on Emerging Transnational Criminal Law.
Deadline for abstracts submission: 1 December 2015 More info: <http://tinyurl.com/ok9rdft>

The Juris Diversitas Annual Conference in Louisiana has issued a Call for Paper on the topic “Unity and/or Diversity”.
Deadline of Submission: 6 December 2015 More Info: <http://tinyurl.com/nhcrs2s>

HEAD OFFICE



ADC-ICTY

ADC-ICTY
Churchillplein 1
2517 JW The Hague
Room 085/087
Phone: +31-70-512-5418
Fax: +31-70-512-5718

Any contributions for the newsletter
should be sent to Isabel Düsterhöft at
iduesterhoeft@icty.org

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EVENTS

Detention in Armed Conflict and the Significance of the Serdar Mohammed Case Lecture

Date: 14 October 2015

Location: The Hague, The Netherlands

More Info: <http://tinyurl.com/oqug6kf>

The Constitutional and Judicial History of Pakistan by Khalil Ur Rahman Ramday

Date: 15 October 2015

Location: The Hague, The Netherlands

More Info: <http://tinyurl.com/nfb3jek>

Conference of Service of Process and Taking Evidence Abroad: A Celebration of The Hague Conventions

Date: 2 November 2015

Location: Washington DC, US

More Info: <http://tinyurl.com/nb8rwy3>

The International Association of Constitutional Law's Constitutional Responses to Terrorism Research Group Annual Workshop 2016

Date: 10-11 March 2016

Location: London, UK

More info: <http://tinyurl.com/oc6uxlc>

OPPORTUNITIES

Legal Officer (P-3), multiple positions

International Residual Mechanism for Criminal Tribunals

Legal Affairs, Registry and Chamber

Closing Date: 22 October 2015

Legal Researcher - EU and Polish Law

Greenpeace, Belgium

Closing Date: 23 October 2015

Assistant Legal Office (P-1)

Special Tribunal for Lebanon, Chambers

Closing Date: 27 October 2015

Associate Legal Officer (P-2)

International Criminal Court, Appeals Division, Chambers

Closing Date: 4 November 2015

Assistant Evidence Reviewer (P-1)

Special Tribunal for Lebanon, Office of the Defence

Closing Date: 4 November 2015