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## ICTY CASES

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## ICTY NEWS

### Prosecutor v. Tolimir (IT-05-88/2)

On 12 November, the appeals hearing in the case against Zdravko Tolimir took place. On 12 December 2012, the Trial Chamber sentenced Tolimir to life imprisonment. He was convicted on the basis of individual criminal responsibility pursuant to Article 7 of the Statute for genocide, conspiracy to commit genocide, extermination, murder, persecutions and inhumane acts through forcible transfer. The Chamber did not enter convictions on the counts of murder (cumulative convictions) and deportation. Tolimir was the Assistant Commander for Intelligence and Security of the Bosnian Serb Army (VRS) Main Staff, reporting directly to the Commander of the Main Staff, Ratko Mladic.

On 11 March 2013, the Defence filed its notice of appeal, the Prosecution did not file any appeal. The amended notice of appeal of the Defence was filed on 9 September 2013 and the public redacted version of the appeals brief was filed on 3 March this year. The Appeals Chamber deciding on Tolimir's appeal is composed of Judge Theodor Meron (presiding), Judge Patrick Robinson, Judge Mehmet Güney, Judge William Hussein Sekule and Judge Jean-Claude Antonetti.

Tolimir is self-representing and was assisted by his Legal Advisor Aleksandar Gajić during the appeals hearing on 12 November. Tolimir presented 25 grounds of appeal in his submissions and the Appeals Chamber had invited the parties to address a number of specific grounds of appeal in their oral submissions before the Court, as outlined in the 31 October *Addendum to the Scheduling Order*.

## ICTY NEWS



## Also in this issue

It is the Defence's argument that there is no evidence to show that the VRS had genocidal intent in respect of the population in Žepa and that genocide was in fact committed. The Defence further states that Tolimir had no information and hence no knowledge of any murders of Muslim prisoners. Tolimir also personally addressed the Appeals Chamber at the end of the appeals hearing and noted that the international community had been biased during the conflict. An elaborate analysis of the arguments presented by both parties will be featured in Newsletter issue 79.

## Prosecutor v. Mladić (IT-09-92)

On 23 October, the Trial Chamber presided by Judge Orie decided to grant the Prosecution's motion to reopen its case in order to present evidence regarding the mass grave found in Tomašica, near Prijedor, Bosnia and Herzegovina (BiH). Despite the fact that the Prosecution case was rested in February this year and that the Defence case has been going on since May, the Prosecution will be able to call six expert witnesses and seven fact witnesses, as well as produce various pieces of documentary evidence.

In its motion, the Prosecution explained that, even though the the Tomašica mass grave was discovered in September 2013 and the forensic analysis began immediately, they considered it more appropriate to wait for the results of all the investigations instead of requesting to tender the evidence as they gathered it. Moreover, the Prosecution remarked that the Defence had been given notice of the Prosecution's intention of tendering evidence regarding the Tomašica mass grave already in November 2013, and that the motion was filed only a few days after they received the last expert report.

Notwithstanding the Defence's claim that granting the Prosecution's motion to reopen its case would significantly and unduly delay the proceedings, the Trial Chamber held that the right of the Accused to a fair trial is not impaired by the reopening of the Prosecution case. As a matter of fact, the Chamber has heard only one fifth of the Defence witnesses so far, and no specific evidence concerning Prijedor has been presented by the Defence. For these reasons, according to the Judges, the Defence will have numerous occasions to rebut the evidence relating to this subject matter throughout its case. The Chamber will decide on the exact timing of the re-opening at a later stage.

On 21 October, Radojica Mladjenović testified for the Defence. During the conflict he was the Chairman of

*Radojica Mladjenović*

the Executive Committee of the Foča Municipal Assembly. He testified that the members of the Executive Committee, including himself, had difficulties establishing the new government, as they could not find an agreement on how to divide the departments among the different members. A meeting was held before the outbreak of the conflict in Foča, in order to attempt reaching a solution to prevent the war. The parties were prepared to divide the territory reciprocally. However, the agreement seemingly reached between the Serbian Democratic Party (SDS) and the Party of Democratic Action (SDA) was not practically implemented because there was not enough time. According to the witness, hatred had developed between the two parties after the incident of the transport company Fočatrans, where both Serbs and Muslims participated in a strike that led to an altercation with the police. However, it was the Muslim side who caused the non-implementation of the agreement and outbreak of the hostilities in Foča, by starting the shooting.

During cross-examination by Prosecutor Camille Bibles, a video clip was played, showing a statement made by the witness to the SDS, in which he admitted doing everything the central office requested according to the instructions that came from the Main Board of the SDS. The Office of the Prosecutor (OTP) put it to the witness that it was part of the global plan from Serbian authorities to create an independent Serbian state in BiH from the start. Mladjenović denied that this was prepared. He explained that contacts with the central office were limited because of the constraining hierarchy of the Army of Republika Srpska (VRS) and that there were various sources of orders.

The witness gave information on the Belgrade Battalion, an independent battalion led by Bodigora. The Battalion was subordinated to the Territorial Defence Staff and participated in the event related to the liberation of Foča subsequently to which it withdrew in May 1992. He confirmed that when the VRS was created, the military situation in Foča became more organised, in particular after 28 June 1991, when the Foča Light Brigade was formed.

The OTP put to the witness that the change in the ethnic composition of the municipality was so dramatic that the name of Foča itself was changed to Srbinje to reflect this new ethnic composition. Despite this name change the witness denied that the ethnic composition was the reason for such. Judge Orie asked whether this referred to some kind of "Serbdom". The witness admitted the word "Serb" in the name but denied any underlying agenda behind this.


*Tomislav Savkić*

On 21 and 22 October, the Defence called witness Tomislav Savkić. In November 1992, Tomislav Savkić was the Commander of the 1st Infantry Battalion in Milići and was appointed President of the Serb municipality of Milići. Savkić already appeared as a Defence witness in the trials of Momčilo Krajišnik and Radovan Karadžić. According to the witness, the Muslims were to blame for starting the war, since they did not accept the peaceful division of the town, and instead opted for an armed conflict with Serbs. Savkić explained that the Serb leadership knew that a Muslim attack on Vlasenica was being staged, thanks to a notebook accidentally found by a cleaning lady from the office of Izet Redzić, the pre-war President of the Municipal Executive Board. When the notebook was shown in court, the Judges concluded that it gave no clear indication of an impending attack. However, it was interpreted as such by the Serb leadership, explained Savkić, who was ordered to prevent the conflict by capturing the town without fighting. The witness pointed out a particular sentence in the notebook, "the herd to be killed", which allegedly referred to a list of Serbian men to be killed. The witness was told that he had been the third person on that kill list, but he had not seen the list because it was taken by the then Lieutenant-Colonel Dusko Tadić. The OTP argued that the list did not exist and that it was subsequently added to the notebook.

During cross-examination, the witness confirmed his statement's declaration that many of the Muslims buried in the Nova Kasaba grave in July 1995 had in fact been killed during an attempt to break through Muslim-held territory, and were not specifically executed. The Prosecution dismissed this assertion by presenting a picture showing bodies from that grave with their hands tied, seemingly proving that victims were detained and executed. Savkić replied that they might be the two Serb fighters who had gone missing in the area in July 1995. However, the Prosecution affirmed that DNA tests had identified those bodies as being Muslim.


*Trivko Pljevalčić*

On 22 and 23 October, Trivko Pljevalčić testified. Before the war, Pljevalčić worked for the Fočatrans Company. During the conflict, he was Commander of the 3rd Company of the 5th Battalion in Foča. In his statement and during his testimony, Pljevalčić claimed that the Muslims started fuelling the interethnic tensions in the early 1990s with the creation of the first ethnic-based parties, such as the SDA, whose leader publicly advocated that Foča belonged to the Muslims. The witness also explained that the Muslims were the first to organise themselves militarily, to put up the first barricades and to attack the villages surrounding Foča. As a result, the Serbian army only acted in self-defence.

During direct examination conducted by Branko Lukić, Lead Counsel for the Defence, Pljevalčić explained that the Muslims were not forced to leave Foča, but they did so voluntarily. Before they left, they were accommodated in collection centres which they could leave freely in order to buy food.

Further, the witness explained that the name of the municipality was changed from Foča to Srbinje only to make it rhyme with the other municipalities nearby, such as Trebinje, Nevesinje and Ljubinje, and not in order to stress the fact that the Serbs were the majority there. Pljevalčić also pointed out that the old

name was restored after the war because the Muslims opposed the new name.


*Miladin Mladjenović*

The testimony of Miladin Mlađjenović was heard on 23 October. He was a member of the civilian protection in the village of Kravica. The witness was never engaged in a military unit because he was deemed unfit for combat. During the Srebrenica events, he was asked to transport Muslim prisoners. Talking about these events, the witness explained that on the first day of work he transported women, children and men unfit for combat between Potočari and Bratunac, and on the second day he was asked to pick up men from a white house and drove them to an elementary school in Bratunac.

The witness specified that no one stayed in Bela Kuća, the white house, and that none of the prisoners had any kind of luggage or bags. However, during cross-examination, a Srebrenica trial video filmed on the afternoon of 13 July was played, showing the same white house, with many men on the balcony and many bags and belongings everywhere on the floor. The witness maintained he did not see anyone on the balcony when he was there, and that had there been so many bags as shown on the video, he would not have been able to park

He denied seeing any DutchBat or UN vehicles escorting the bus. He also affirmed being the only driver transporting prisoners that day. The Prosecution, however, produced a document establishing that the witness made different declarations in a previous testimony, where he admitted that there could have been other drivers.

The witness was asked whether, between 14 and 16 July, he ever went back to Potočari or Srebrenica, to which he responded negatively. However, the Prosecution confronted him with evidence proving his presence in the region at the time, and the witness confirmed he had been working in Vihor during these days. The Prosecution then asked Mladjenović to confirm the evidence before this Chamber claiming that there were prisoners parked in buses in front of the Vihor Company and that shots and screams could be heard. It is the Prosecution's case that men were taken out and shot outside these trucks. The witness affirmed that the buses he saw could not have been full of people; otherwise he would have heard them.

On 23 October, the Defence called its next witness, Milenko Rajak. He was a member of the Territorial Defence Rogatica and President of the Rogatica Veteran's Organisation. Rajak explained that he had kept records of fallen fighters, military invalids and civilian casualties. These documents contained the names of several of his fellow combatants who were killed on 14 July, thus, according to the Defence, contradicting the Prosecution's assertion that there was no fighting in the area of Rogatica.

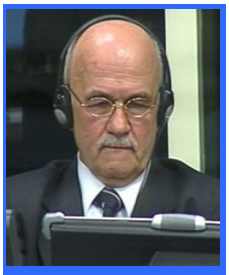
During cross-examination, which continued on 27 October, Rajak confirmed that it was common in the Rogatica Brigade to refer to non-Serbs as Ustashe, while later in the testimony he explained that it was also common for the Muslim media to refer to the Serbs as Chetnik, a term he considered an insult. The witness confirmed that he had never been present at Rasadnik, and thus was unaware of who the guards were or whether civilians were held there, although he understood that there were soldiers and prisoners of war of Serbian ethnicity present. Rajak added that after the war he was made aware that the Veljko Vlahović School was a detention centre for Muslims, Serbs and Croat civilians. He noted that the overwhelming majority of prisioners were Muslim.

Mladić's war time assistant, Rajko Banduka, was the first witness to be called during the last week of October. He gave information that the VRS Main Staff Headquarters were located in Crna Rijeka near Han Pijesak. Mladić and the witness were stationed in a house about a kilometre from the Headquarters. The witness explained the communication system that was used there and he described their conditions of living in Crna Rijeka as very modest. However, during cross-examination, the Prosecutor showed a photo of the facility and noted that it was in fact a one-storey villa.

When asked whether Mladić received communication reports at his desk every day, the witness explained that this information did not reach him directly but ended up in the Operative Centre, two kilometers away. Mladić did not spend much time in Crna Rijeka, but instead was mostly with the units and in

the field. The witness also affirmed that Mladić never reached decisions or wrote orders alone, but took the advice of many persons including his Corps Commanders.

Banduka alleged that he had been following the events in Srebrenica and Žepa on TV in his apartment in Bijeljina, as he was recovering from an illness. However, he was confronted with several intercepted conversations suggesting his presence in Crna Rijeka during that time, which he continued to deny.


*Slavko Kralj*

Slavko Kralj, former Liaison Officer with the United Nations Protection Force (UNPROFOR) in the VRS Main Staff, was called by the Mladić Defence on 27 October. His testimony ran over three days. He alleged that a large number of humanitarian convoys were permitted entry to the Muslim enclaves in BiH during the war. The Prosecutor, however, pointed out that there was a famine in the enclave of Srebrenica primarily because the VRS prevented international humanitarian convoys from reaching it. To back this assertion, the OTP produced an audio recording of Mladić saying the following: "I did not let anything through. I would not have captured Srebrenica and Žepa if I had not starved them throughout winter, I only let one or two convoys through from February onward". The witness never heard Mladić make such statements.

The Prosecutor also produced a report sent by the UN special envoy Yasushi Akashi to the UN headquarters in New York, denouncing that the Serb army was preventing aid from entering the enclaves. Additionally, documents were brought up establishing hunger death in the enclave. The witness denied that anyone starved to death during the war in BiH and denounced these reports as "usual propaganda", disseminated by the Muslims to "get as much humanitarian aid as possible".

During re-examination, Defence Counsel referred to the suggestion put forth the day before by the Prosecutor that Mladić had been in charge of implementing Karadzić's Directive 7, calling for a "planned and unobtrusive" restriction of relief supply deliveries to the enclaves in order to make the "Muslim population dependent on our goodwill". The Defence pointed out that Mladić had written Directive 7.1 later on, short of any restrictions of humanitarian aid. The witness affirmed that the army had acted in line with Mladić's order, rather than Karadzić's.


*Veljko Marić*

Veljko Marić testified in the Mladić trial on 29 and 30 October. Marić is a surgeon and was directing the Foča hospital in 1993. In the statement he gave to the Karadzić Defence team, Marić explained that, before the war, the hospital had a mixed staff. However, all Muslim and some Serb doctors left because of the hostilities in 1992. Marić stressed that both Serb and Muslim patients were treated at the Foča hospital without any discrimination based on their ethnicity. He also recalled that the hospital staff tried to hand over children that were separated from their Muslim families, but the Muslim authorities refused to take them. Further, the witness reported that during the war, Serb and Croat professors left Sarajevo and went to teach at the Medicine Faculty of Foča.

During cross-examination conducted by Grace Harbours of the OTP, Marić was asked about the fate of some of his colleagues of Muslim ethnicity. He confirmed that he helped one of them, Aziz Torlak, to hide when soldiers came to the hospital looking for him. Eventually, Torlak was captured and brought to the Penal Correctional Facility (KP Dom). The witness also recalled that another colleague of his, Amir Berberkić, had left the hospital without permission and then, ten or fifteen days after his departure, was brought back wounded and operated on by Marić. Moreover, Marić recalled that in October 1993, Karadžić visited the Foča hospital together with his wife. According to the witness this was a regular visit and was not a celebration of the Serb take-over of Foča.

The last witness of the week was Mane Djurić, whose witness statement purports to the reasons and motives behind the establishment of the Crisis Staff in the municipality of Vlasenica. During cross-examination the witness confirmed that prior to the war the municipality of Vlasenica was multi-ethnic, comprising a Muslim majority, Serbs and Croats. Due to the beneficial economic status of the area, the


*Mane Djurić*

witness testified that interethnic relations had been good prior to the multiparty elections, whereupon relations between the different ethnic communities became polarised. It was also established that the witness was unaware of any Serb against non-Serb crimes being registered during this time and that all crimes in the register reports pertained to Muslim offences. During cross-examination continuing on 3 November, it was furthermore confirmed that the witness was unaware of any specific reports filed by police officers against non-Serbs.

The cross-examination subsequently moved on to discuss crimes committed against non-Serbs in Vlasenica in 1992, including looting and fatal casualities, despite the Public Security Station (SJB) trying to prevent this. Djurić additionally confirmed the destruction of the Vlasenica town mosque in 1992. During late May and early June 1992, Djurić recalled that a number of civilian Muslims were brought to Vlasenica police station and he only learnt later on of reports of beatings and mistreatment.

Turning to Sušica camp, Djurić testified that he took measures to remove the camp from Vlasenica and that he heard in 1992 that there were some incidents of beatings and killings, which he reported to the VRS. The cross-examination was concluded by an explanation of the movement of Muslims out of Vlasenica and the flow of Serbs into the area, who were assigned abandoned houses and apartments.

Neđo Vlaški, former member of the State Security Service, testified from 3 to 5 November. He explained that before the war the BiH State Security monitored all forms of nationalism, including the activities of the Young Muslims organisation, of which Alija Izetbegović was a member. Vlaški established that parts of the documentation regarding the Young Muslims suddenly disappeared from the Department of Documents in 1991. He accused the Muslim and Croat politicians to be responsible for starting the war. According to the witness, after Serbs were marginalised in government institutions, the Serb leadership had no choice but to establish its own institutions and move towards secession from BiH.

In cross-examination, the Prosecutor presented several pieces of evidence showing that even before the war the Bosnian Serb leadership had designed a plan to create independent state authorities and institutions, claim part of the BiH territory and ethnically cleanse it. In particular, the Prosecution presented an intercepted conversation between Karadžić and one of his subordinates, talking about the establishment of a separate government. Vlaški confirmed that this conversation reflected the social reality at the time.

The Prosecution then brought up a report on the barricade in Sarajevo. The witness had no information about the barricades until the moment they were erected on 1 March.

A video clip was played, establishing the creation of independent Bosnian Serb police forces. Vlaški did not contest that new forces were being formed and explained that this was necessary in order for the Serbs to be able to defend themselves against attacks from other ethnic groups.

The Prosecution also brought up a document pertaining to the decision that “the entire Serb population of Trnovo (...) be evacuated by 30 May 1992 and that in a joint effort with the Kalinovik forces the entire Muslim and other population be killed or ex held in an armed intervention to thus provide an ethnically clean Serb territory”. The witness explained this was an impossible allegation, as the area of Trnovo consisted of only 30 percent Serbs. As a minority, Serbs preferred a peaceful solution to launching an attack on the 70 percent Muslim majority, Vlaški explained.

On 5 November, Ranko Kolar was called to testify. During the war, Kolar was a Platoon Commander in the 1st Company of the 1st Infantry Battalion of the 6th Sana Light Infantry Brigade. He testified about the main tasks his unit was engaged in, first in Croatia and then in Sanski Most, BiH. In his statement, Kolar explained that, among other things, his unit was involved in unblocking friendly forces that had been circled by the Croat-Muslim forces in the Korenjovo village. The same Croat-Muslim forces, composed of around 150 men, negotiated with the Serbs and surrendered to them after the fighting. They were brought to the separation line with the BiH army and

exchanged for 15 Serb soldier, with the help of the Red Cross.


*Ranko Kolar*

Kolar, who used the expression "ethnic intolerance" in his statement, was asked by the Defence and Judge Moloto to further explain this choice of words. The witness referred to the example of attacks that occurred in Slovenia against the Yugoslav People's Army (JNA) and explained that he viewed them as an attack to the multi-ethnic composition of the then state of Yugoslavia.

Moreover, Kolar reported that orders were given to the soldiers not to mistreat prisoners of war and not to open fire against buildings in populated areas unless armed resistance was coming from there.

On cross-examination, the witness explained he had no knowledge about the killing of 27 non-Serb civilians in Hrustovo on 31 May 1992, as he only arrived three days later. He also asserted he did not know about the Ušće Dabar mass grave as his unit was staying more than two kilometers away from the location of the mass grave.


*Savo Bojanović*

Savo Bojanović, former Judge in the Bijeljina Military Court, testified on 6 November. He began by explaining that the Military Court was established in mid-July 1992, and that its territorial jurisdiction coincided with the area of responsibility of the Eastern Bosnia Corps and Drina Corps. The witness ensured that the Court was impartial and the law applied consistently regardless of the ethnicity of the perpetrators and victims. Proof of this impartiality, the witness said, was contained in the several investigations against Serb soldiers for crimes against Muslims. However, during the cross-examination conducted by the Prosecution, it was noted that those proceedings against Serbs rarely resulted in convictions and in several cases the perpetrators were released pending the trial, allowing them to flee.

The witness insisted that Serbs soldiers were being prosecuted by this Court, and provided several examples. However, the Prosecution put to the witness that none of the examples chosen actually proceeded beyond investigation, and that when the war ended, the perpetrators were still at large. The Prosecution case is that Serb perpetrators were only ever convicted before the Bijeljina Military Court for looting houses and that almost all of them were placed on probation. The witness explained that only a sentence of five years or more triggered a mandatory requirement for detention and agreed that prison sentences were only given for the gravest crimes.

Dušan Kukobat appeared to testify on 6 November. He was the former Chief of Staff of the 17th Light Infantry Brigade from Ključ. The witness spoke about several of his meetings with Ratko Mladić during the war. The witness said that Mladić always stressed that soldiers were forbidden to commit crimes against non-Serb civilians and prisoners of war. However, during cross-examination the Prosecution pointed out that several officers from the witness's brigade had been charged by the State Court of BiH with crimes against Muslims and Croats in Ključ. Kukobat affirmed he was unaware of those crimes. He explained that he spent most of the war on the front line and therefore did not spend time in the inhabited parts of the Ključ municipality.


*Tomislav Puhalac*

The first witness of the week starting on 10 November was Tomislav Puhalac, member of the State Security Service. In his mind, Croat and Muslim politicians were to blame for the war because their political manoeuvres impeded Serb representatives from participating in the decision making process. The witness also claimed that the Muslim-Croat coalition used the police reserves and turned them into paramilitary formations.

According to the witness, many members of the Ministry of Interior of BiH were notorious criminals, who tended to harass Serbs, for instance by arbitrarily limiting their freedom of movement or excessively stopping them at checkpoints. The witness himself experienced such harassment at a checkpoint, after which he and his family decided to leave Sarajevo. The witness was asked whether his agency had any information about the activities of the Ministry of the

Interior in forming the Seve Unit. He replied that the secret service had indeed received information that such a unit was being formed, and operated illegally. He also stated that top officials of the Bosniak Intelligence Service (AID) organisation were responsible for the formation and operation of the Seve Unit, whose principal activity was to cause unrest in Montenegro.

**Seve Unit**

The Seve Unit was a sniper-terrorist group made up of former Yugoslav Counter Intelligence Service members, Special Forces or recruited criminals.

During cross-examination, the Prosecution noted that the witness left Sarajevo on 4 April 1992 and that consequently, the allegations in his statement about the events in the city after that date could not be based on personal knowledge but rather on rumours and beliefs. The witness partly agreed, but also noted that, as he worked for the secret service, he did receive reports, about events occurring in the capital during the war, both from Serbs leaving the city and from intercepted communications.

The Prosecution asked the witness if he was aware that Serb Democratic Party (SDS) forces were successfully lodging attacks in Sarajevo in the period of late April/early May 1992 and of the general conditions of the capital at this point in the war. The witness corrected that barricades, blockades and checkpoints were erected by both sides while Sarajevo was under a double siege.

*Trifko Komad*

On 10 and 11 November, witness Trifko Komad testified. Komad used to be a Professor of Sociology dealing with affairs of national defence and religious issues. He was involved in the founding of the SDS in July 1990 and became a member of the Main Board and later Secretary of the Executive Council of the Main Board of the SDS. The witness talked about the position of the Serbian people in BiH before the war and the attempts to wipe out the Serbian spiritual and cultural heritage in BiH before the outbreak of the war. The witness quoted the book of Ala Uković called "Spiritual Genocide" to describe the discrimination encountered by Serbs and referred to one chapter establishing that 170 churches and 20 monasteries were destroyed as well as 116 damaged. However, during cross-examination the Prosecution pointed out that the witness comments did not come from direct observations which he admitted.

The witness worked for the Bureau of Republika Srpska in 1993. The Prosecution produced a document talking about a British humanitarian aid convoy from an organisation called "The Serious Road Trip", which had been stopped at a Mostar check-point and where medical equipment had been confiscated. A second document produced by the Prosecution seemed to show that in order to receive permission for passage, a convoy had to leave behind half of its cargo. The witness was asked whether these were common policies and responded that it was not part of the official guidelines of the party, but they were unable to control everything, indicating that it might have happened occasionally.

The Prosecution put forward the fact that the SDS had a strict chain of command and hierarchy. The witness refused to confirm this. He described relations between the central and local bodies of the SDS as complex, explaining that there were many issues surrounding misconduct and animosity. There were instances, according to the witness, where individuals wilfully disrespected the principles and guidelines of the central command of the party because of personal ambitions and struggle for power. The OTP put to the witness that Karadžić used to immediately make changes to the Main Board of the SDS whenever someone's behaviour was not in line with the central policies of the party. The witness disagreed, explaining that it was only the Main Board itself or the SDS organs that could do so.

After Komad completed his statement, the Defence called Čedo Šipovac, former employee of the Secretariat for National Defence, a body in charge of mobilisation. The witness explained that, after the conflict broke out in the area of Prijedor, there were military conscripts, Croats or Muslims, in the Army of the Republika Srpska. He then detailed the ethnic composition of the Ljubija Battalion, the 6th Motorised Battalion, which was manned by people from different ethnicities, including Serbs, Croats, Muslim and Ukrainians. He explained that the orders received were never based on perceptions of ethnicity.

Šipovac affirmed that at the end of 1991 and at the beginning of 1992 there were problems with carrying out mobilisation, because Muslim and Croat political leaders gave instructions not to answer to the call-up. The witness claimed, that it was overwhelmingly Serbs who responded to this call up.

In his statement, the witness characterised Omarska not as a camp but rather as an investigation centre and Trnopolje as a collection centre. However, during cross-examination the Prosecutor confronted Šipovac with the allegation that one of Šipovac's colleagues was tortured and killed in Omarska. The witness affirmed knowing about this event.

The Prosecution also put it to the witness that the 1st Krajina Corps command had ordered to purge officers on an ethnic basis because of the danger caused by deficiencies in the units. Several documents were shown, but the witness repeatedly attested that there was no intention to purge the units of Muslim and Croat officers.

On 12 and 13 November, Sveto Veselinović, member of the Crisis Staff and first President of the SDS in Rogatica gave evidence. The witness explained that when the tensions began in the area he received instructions to establish a factual ethnic division on the ground. Such a division already existed in most villages that were of exclusively Muslim or Serb ethnicity, but most towns were mixed. The local crisis staff in Rogatica, the witness explained, agreed to divide the city in order to avoid a conflict. However, the negotiations with the Muslims failed and the Muslims initially took over the centre of the town before being forced to retreat due to Serb attacks.

According to the witness, the Muslims left the town in ruins. The Defence produced a video, taken by the witness, showing the destruction of the town: destroyed shops with shattered windows, burned houses and buildings in the centre and a Mosque in ruins. Veselinović had also filmed his wife's family house that was torched when the Muslims were in control of the municipality, along with many other houses in the neighbourhood.

During cross-examination, the Prosecutor pointed out that from the time the Serb administration was established in Rogatica a number of crimes were committed against Muslims, such as torture and sexual abuses, in particular in the Rasadnik prison camp. The witness declared never visiting the camp and the OTP suggested that this was due to his will to overlook the crimes committed against the detainees. At the end of his testimony, the Prosecutor asked Veselinović if it was true that after the war there were "almost no Muslims" left in Rogatica, which the witness confirmed.


*Špiro Pereula*

The last witness of the week was Špiro Pereula, an officer in the Bosnian Serb Army that held various posts during his military career. The witness had also been a member of the Republika Srspka Government's Commission for Exchange. During cross-examination the Prosecutor presented documents showing that civilians were detained and died in Serb prison centres (for instance in the Kula prison in Sarajevo). As far as he could remember, Pereula was a member of the Commission for no specific reason and had no important role there. According to him, he never attended any meaningful meetings and no information was conveyed through him. He denied having dealt with the exchange of prisoners from the Penal Correctional Facility (KPD) Butmir, but confirmed having taken part in meetings at the Sarajevo airport regarding the exchange of prisoners.

The witness talked about Mladić, stressing the characteristics of "humanism, fairness, discipline and work ethic". The OTP put forward its case that Mladić's army targeted civilians, by showing an order issued by the witness in June 1993, seemingly not differentiating civilians and soldiers. Pereulla alleged he had signed the document, due to a "mistake made by an ignorant typist" and due to the urgency of the situation.During this last hearing of the week, it was announced that the Prosecution team would be reinforced by a new member, Alan Tieger, who had previously worked on the Karadžić trial.

## Prosecutor v. Vojislav Šešelj (IT-03-67)


*Vojislav Šešelj*

On 4 November, Trial Chamber III issued an order inviting the Netherlands to submit observations on the possible provisional release of Vojislav Šešelj *proprio motu*. The Chamber had recently examined the possibility of provisional release of Šešelj due to his worsening health but had to suspend such considerations due to a lack of cooperation from the Accused. After receiving additional confidential information that pointed to the deterioration of the Accused's health, the Chamber, to "avoid a worst-case scenario" ("pour éviter le pire"), considered the possibility of provisional release respecting the conditions of Rule 65 of the Rules of Procedure and Evidence. The Chamber invited the Government of the Kingdom of the Netherlands and Republic of Serbia to file their opinion on the provisional release of the Accused *proprio motu*.

On 6 November, the Chamber, in accordance with the requirements of Rule 65, noted in its Decision that it was satisfied that if released, the Accused would not pose a danger to any victim, witness or other person after being given to the host country. Pursuant to Rule 65 (B), the Chamber received observations from the Government of the Republic of Serbia indicating its acceptance of Šešelj in its territory as long as the Accused adhered to the conditions set by the Chamber. The host state did not oppose the provisional release and in view of the situation, the Chamber considered that the compelling humanitarian reasons were in favour of Šešelj's release and therefore granted his provisional release to the Republic of Serbia.

On 11 November, the Dissenting Opinion of Judge Mandiaye Niang to the Order on the Provisional Release of the Accused was published. In the document available to the public Judge Niang expressed his views on the Chamber's decision and indicated that while he was in favour of the provisional release, he would not have done it without putting in place practical measures allowing Serbia to assist the Tribunal in ensuring that the Accused would not place in danger any witnesses and would appear before the Tribunal when required.

***Rule 65 (B)***

***Provisional Release***

"Release may be ordered at any stage of the trial proceedings prior to the rendering of the final judgement by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person…"

Šešelj was released from the ICTY's Detention Unit on 12 November and arrived on 13 November at Belgrade Airport, where he was greeted by family, party officials and supporters.

## Prosecutor v. Mićo Stanišić & Stojan Župljanin (IT-08-91)


*Judge Agius*

On 12 November, a status conference in the case *Stanišić and Župljanin* was convened. The Presiding Judge Carmel Agius took appearances from both parties. Appellant Župljanin was absent, but was represented by his Defence Counsel Dragan Krgović. The Presiding Judge explained the procedure of signing the waiver, which should be sent to the Detention Unit and forwarded to the Registry.

Judge Carmel Agius also explained the legal framework for the status conference under Rule 65*bis* of the Rules of Procedure and Evidence. The present conference was the fifth status conference since the parties filed a notice of appeal in May 2013. The Presiding Judge briefly reviewed the recent procedural history of the case, which included among others, a *Decision on Joint Motion on Behalf of Mićo Stanišić and Stojan Župljanin Seeking Expedited Adjudication of their Respective Grounds of Appeal* 1bis *and* 6, a *Decision on Stanišić's Motion Requesting a Dec-*

*laration of Mistrial* and *Župljanin's Motion to Vacate Trial Judgment,* as well as a Decision on *Prosecution Motion for leave to file a Sur-Reply to Župljanin's Reply to Prosecution's Consolidated Supplemental Response Brief Concerning Additional Appeal Ground*. Judge Agius mentioned a pending motion filed by Stanišić pursuant to Rule 115 of Rules of Procedure and Evidence, requesting addition of new evidence. The Defence had no issues to raise, while the Prosecution asked to be notified as much as possible in advance about when the appeal hearing will take place. The Prosecution asked for at least two and half months notice in advance.

The Presiding Judge promised to be as expeditious as possible, but he also added that at the moment the Tribunal is facing staffing issues and that originally his plan was "to have the hearing towards the end of March" 2015. However, in light of the current trend of understaffing the hearing might be re-scheduled to April or May. He expected to be in a position by January or February to announce when the hearing will take place. Judge Agius also stated that "there is drafting taking place already", which is not in an "advanced stage", but also not "as bad as [he] had anticipated, due to the lack of staff".

## Prosecutor v. Popović *et al.* (IT-05-88)

A status conference in the case Popović *et al.* took place on 18 November. The Presiding Judge Patrick Robinson took attendance from the parties and it was noted that all of the Co-Accused and their Counsel were present, except for Drago Nikolić who was represented by his Lead Counsel Jelena Nikolić.

Judge Robinson moved on to review all recent decisions issued by the Appeals Chamber in this case.

On 22 July, the Chamber issued a public decision dismissing Popović's *Sixth Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115* and on 3 September, the Chamber issued another public decision dismissing Nikolić's *Motion for Admission of Additional Evidence on Appeal pursuant to Rule 115*.

On 17 November, the Appeals Chamber issued a scheduling order for the public pronouncement of judgment, which is set for 30 January 2015.

As per pending motions, the Presiding Judge mentioned the *Seventh Motion* filed by Popović on Rule 115. The Judge noted that the Prosecution has responded and that the Motion is still under consideration with the Chamber.

***Rule 115 (B)***

***Additional Evidence***

*A party may apply by motion to present additional evidence before the Appeals Chamber. Such motion shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed, and must be served on the other party and filed with the Registrar not later than thirty days...*

## ADC-ICTY Annual Training

On 9 November, the ADC-ICTY held its annual training conference. The training was dedicated to the topic of Legal Drafting and was lead by ADC-ICTY President Colleen Rohan, Kristina Carey (ICTY-OTP) and Christos Ravanides (ICTY Chambers). The ADC-ICTY would like to express its sincere gratitude to all speakers and participants for the insightful and interesting discussion and comments.

Photos from the training are available at: http://tinyurl.com/kj49cbf

***Kristina Carey, Colleen Rohan and Christos Ravanides***

## ADC-ICTY General Assembly and Election of President


*Colleen Rohan*

On 9 November, the ADC-ICTY held its annual General Assembly. During the Assembly many issues were discussed and elections for the 2014-2015 committees occurred. Colleen Rohan was re-elected as President and the Vice-Presidents are: Jens Dieckmann, Christopher Gosnell, Dragan Ivetić and Slobodan Zečević. The new committees look forward to working with all members of the ADC-ICTY during their tenure.

For a full list of ADC-ICTY committees: http://tinyurl.com/nbjbdsh

# ADC-ICTY ETHICS TRAINING

On 8 November 2014, the ADC-ICTY organised a one-day Ethics Training for ADC-ICTY members and external participants from all tribunals and courts in The Hague. The training was held at the Bel Air Hotel in The Hague and was attended by numerous participants, which marked a wonderful success. The day was split up in three panels, focusing on the stages of pre-trial, trial and appeal. Panellists included ICTY Judges Christoph Flügge and Alphons Orie, ICTY Prosecutor Douglas Stringer, Defence Counsel and ADC-ICTY members, as well as the Dean of The Hague Bar Association, Bas Martens.

## Opening Remarks and Keynote Speech

The training started off with a short opening speech by Colleen Rohan, President of the ADC-ICTY. She explained the format of the training, which would consist of three panel discussions throughout the day, namely ethical considerations during pre-trial, trial, and appeals proceedings. She highlighted that for the first time the training was not only open to ADC-ICTY members but also to external participants.

Concluding her speech she left the audience with one thought: International lawyers tend to believe that they share the same values, which is not the case. Coming from different legal backgrounds with different ethic codes, lawyers working in the international world have different perceptions of what is ethically right and wrong.

Following the opening speech, Michael G. Karnavas' keynote covered a variety of considerations relating to the "grey area" of ethical conduct and problems that lawyers are faced with in searching for an answer to the question of what is ethically right conduct. As rules and codes oftentimes do not provide clear answers to this question, lawyers have to resort to their own perceptions in order to figure out where the "red line" is – "If we think something is wrong, it probably is wrong". Ethics committees can provide an advisory opinion, however, there is no guarantee to such. Karnavas emphasised that it is a lawyer's responsibility to be honest with himself and his obligation to pursue the interests of the client, within the boundaries of the law. Moreover, as it is the duty of Defence Attorneys to press the case whilst avoiding crossing a line believed to be red. Karnavas referred to "situational or discretionary ethics" when confronted with what may be morally right in one context and morally wrong in another. Such resort to one's own moral and ethical standards is necessary as "codes of conduct don't give all the answers".


*Michael G. Karnavas*

For the full speech visit: http://tinyurl.com/pmrgu7r

## Panel I: Ethical Considerations during Pre-Trial Proceedings

The first panel of the day was moderated by ADC-ICTY member of Gregor Guy Smith and featured Douglas Stringer from the OTP, as well as ADC-ICTY members Mira Tapušković and Alan L. Yatvin. It started a discussion on ethical considerations, focusing on the pre-trial stage of court proceedings. The panel recognised major challenges faced by lawyers working at international criminal courts, such as different cultural and legal values, language barriers and the controversial nature of trials that usually raise many political and social issues.

Tapušković pointed out that existing Codes of Conduct are not precise enough and often do not offer guidance on how to act in concrete, real-life situations. She noted a good practice from Serbia, where the Code of Conduct is not created by an external body, but by the Bar itself, which ensures that it meets the needs of those for whom it is intended. Yatvin followed up by noting the issue of possible conflicts between the domestic Code of Conduct and a Code of Conduct of an international court. In these situations, the panellists agreed, there is no right answer and one has to try to fit the domestically gained experience into the international environment, while following the highest personal ethnical standards.

*Douglas Stringer, Gregor Guy-Smith, Mira Tapušković and Alan Yatvin*

One of the questions that arose was how to "ethically" develop a defence in case the client is involved in criminal behaviour or wishes to testify falsely. Stringer pointed out the importance of documenting conversations with the client. The panellists noted that Counsel often does not know if the client provides false information and that the key strategy is to develop a relationship of trust with the client, where Counsel is in a position to negotiate and agree with the client on how to organise the defence. In some cases, however, such as the client insisting on testifying falsely, the panellists believed that Counsel ought to withdraw from the case. Yatvin added that the withdrawal itself often calls for ethical considerations such as providing the Court with sufficient reason for withdrawal while preserving confidentiality.

Another topic was ethical considerations when dealing with protected witnesses that appear especially often before international tribunals. In particular, the panellists noted that Counsel often face ethical uncertainties when dealing with documents regarding protected witnesses or when such witnesses enter in contact with Counsel on their own accord. The participants asked whether Counsel should, in such situations, keep the documents for himself, whether he is allowed to share them with the client, or whether Counsel should inform the Prosecution if being contacted by a Prosecution witness. The panellists stressed that it has been the stance of many Trial Chambers that no party "owns" a witness and that contact is not forbidden. However, as stated by the panellists, the parties should inform each other, at least when in the pre-trial stage, about these issues. Stringer added in the end that the client should in any case be warned about the protective order and that such warning should be duly documented.

Lastly, the panellists discussed issues of conflicts of interest. The panellists discussed whether multiple or joint representation is ethical and pointed out that such representation could have many disadvantages. Such include delays and high costs of proceedings, under-representation of one client, disagreements and different interpretation of same facts by clients and, most importantly, the trouble of certain facts being in favour of only one client, but harmful to the other. A positive side of this kind of representation is, as noted by some participants, easier organisation of the defence.

## Panel II: Ethical Considerations during Trial Proceedings

The second panel was led by Moderator Michael G. Karnavas. The Panellists included Judge Christoph Flügge and ADC-ICTY members Stéphane Bourgon, Christopher Gosnell and Peter Haynes QC.


*Stéphane Bourgon, Michael G. Karnavas, Peter Haynes QC, Judge Flügge and Christopher Gosnell*

Bourgon kicked off a general round of comments by stating that the relationship between Counsel and client is usually a long term relationship and therefore, it is necessary to identify, if possible from the very beginning, the issues that may raise a conflict. Conflict may lead Counsel to withdraw at a later date, which is very hard, as there are dire consequences for the Accused himself. Haynes then stated that there are no internal ethics at the ICTY. The Prosecutor and Chambers determine the ethics and can waive immunity. Judge Flügge gave his opinion on the relationship between Counsel and client. He stated that he was opposed to the concept of self-representation, which is against the interest of the client in his opinion. According to him, representation is necessary. Lastly, Gosnell gave his opinion about the Rules and Procedures of the ICTY. According to him, these Rules are somewhat developed, though not as detailed as in some domestic jurisdictions. He deemed it unfortunate that there are asymmetrical obligations at the ICTY. Despite the Code of Conduct being modelled upon the New York Code, the ICTY Code only applies to the Defence. The Prosecution merely has some internal guidelines, which is an unhealthy dynamic.

One of the subjects discussed was the role of the media. First, Haynes stated that Counsel that speak to the press often do not do so for the interest of their client, but rather for their own. Therefore, Counsel ought not to talk to the press unless explicitly instructed to by the client. Judge Flügge said that when there is no rule of law, the press can play a valuable role; for example, in totalitarian regimes it is sometimes necessary to involve the press and the public. Karnavas provided an example of when the press can be valuable: in the ongoing case 002/02 at the Extraordinary Chambers in the Courts of Cambodia (ECCC), lawyers are forced to go on trial and appeal at the same time. The only way to exert pressure is a press release, in order to inform the public of this paradox situation.

The panel also discussed the issue of inducements offered to the witnesses. One example related to when an inducement was offered to a witness that did not want to testify, by for example a close friend or family. According to Bourgon, this is a complex question; he would first seek advice and explain the consequences to the client. Moreover, there are no specific rules on this; it is largely a grey area.

Karnavas asked the panel what Counsel should do if they found out after the witness went back home. According to Haynes, this depends on which side one is on. If it is the Prosecution and they discover there was on inducement, they would be absolutely, maybe legally bound to disclose. If it is the Defence, again, they would need to discuss with the client and document very carefully.

The discussion moved onto specific situations where the client is on provisional release and contacts one of the witnesses. The panel contemplated the obligation to disclose this when this is discovered. According to Judge Flügge, he as a Judge would want to know about this inducement, as it supports the credibility of the Court. However, the fact that one can contact a witness is, according to Judge Flügge, a problematic concept of the ICTY. Gregor Guy-Smith intervened from the audience and stated that there is also the confidentiality issue between Counsel and the client to keep in mind: as long as the client is not engaged in criminal activities or about to engage in a crime, Counsel should remain silent. He stated that, one has to hold the trust of the client inviolable. When there is

no confidential relationship with the client, there is an ethical dilemma.

Karnavas then addressed the issue of which Code of Conduct to give preference to. He pointed out that there is an obligation to comply with the Code of Conduct of the Tribunal. Some conduct might be permissible while it is not in the Bar's Code of Conduct. He stated that in his opinion Counsel should abide by their national Bar's Code of Conduct, as otherwise they might not be allowed to practice. Gosnell stated that in such cases one needs to ask the bar for an advisory opinion. They can assist without damaging one's career.

Finally, the issue of witness proofing was analysed. While Karnavas agreed that it is absolutely necessary, it raises the question of where the fine line is between refreshing someone's memories and coaching. According to Haynes, one will know when it is going too far. The value of proofing is to determine what questions should not be asked, since it is not about what the witness needs to tell. Regarding the question of whether Counsel can tell a witness what is requested from him to get the necessary information, Judge Flügge answered that, while not familiar with the area, he considered that it is dangerous to turn a witness in a certain direction or to limit a witness to a specific kind of area.

A final concern raised by Karnavas was the practice of the Prosecution giving documents to the witness and afterwards getting a statement. He wondered if that could not be seen as tampering with evidence. The source of the testimony is memory and if documents are provided, a narrative is created. Bourgon answered that he was a firm believer in proofing. It makes testimony much easier for the witness and the Judges, however, if during this proofing new information comes up, it needs to be disclosed. According to him, this is why a good relationship between the parties and a professional relationship of trust needs to exist. According to Stringer, proofing is a way of getting the witness focused on the point of most relevance for the Judges, which is often not the same for the witness. A final statement was made by Judge Flügge, who said he could not imagine a trial without witness proofing.

## Panel III: Ethical Considerations during Appeal Proceedings

The last panel of the day discussed ethical considerations during appeal proceedings. The panel was moderated by ADC-ICTY President Colleen Rohan and consisted of Judge Alphons Orie, Bas Martens from the Hague Bar and ADC-ICTY member Novak Lukić.

*Judge Orie, Colleen Rohan, Bas Martens and Novak Lukić*

Rohan started the discussion by positing that despite appearances, there are many ethical issues at play on appeal. Ethics permeates everyday life, including appellate proceedings. Issues that might come up include what grounds to appeal, a client that might want to raise frivolous claims and to what degree one can criticise both the Trial Chamber and the Prosecution.

Lukić noted that the use of media could also pose an ethical dilemma after the trial phase. Counsel might try to convince the client to keep them on as Counsel during appellate proceedings by using the press to garner support from other lawyers for their efforts on trial. Lukić warned, however, that any statements made to the press might be used against lawyers during proceedings.

Rohan reminded the panel that according to recent case law from the ICTY Disciplinary Panel, Defence lawyers have an affirmative duty to uphold the reputation of the Tribunal. Judge Orie added that Judges even have a duty to talk to the media and to inform the public. He also stated that it is perfectly fine for both the Defence and Prosecution to criticise a con-

viction or acquittal in the media, as long as it is done professionally, before confirming that professional criticism of the Judges would never influence their decision making on appeal. Martens affirmed that Judges are not bothered by comments made to the press.

Prompted by a question from the audience, the panel then discussed the ethics of strategically raising arguments intended to establish future grounds of appeal or to delay proceedings. Judge Orie commenced the discussion with the conclusion that if intentional, such conduct was necessarily unethical. However, following Rohan's discussion of her experience working with death penalty cases where the most ethical concern is prolonging the client's life, Judge Orie conceded that ethics are informed by context. He did note, however, that he considers such conduct civil disobedience and would accept the appropriate disciplinary sanctions.

The panel closed with a discussion of the extent to which a lawyer's ethical duty extends to the post-appeal stage - for example in instances of questionable incarceration conditions or an Accused's request that a case be re-opened. While the panellists were divided on whether a strictly professional duty exists in such circumstances, there was a general acknowledgement of the distinction between a strict ethical duty and a broader moral duty which a lawyer may find prompts them to assist the client in such circumstances.

**The ADC-ICTY expresses its gratitude to the numerous organisers, volunteers and members of the various ADC-ICTY Committees for their invaluable contribution and outstanding support in organising this important Training.**

For photos from the training: http://tinyurl.com/p7t3ydc
For further information regarding the training: http://adc-icty.org/home/news/index.html
For photos from the Annual Party: http://tinyurl.com/qx6ldox

# LOOKING BACK...

## International Criminal Court

**Five years ago…**

On 24 November 2009, the trial in the case *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui commenced before Trial Chamber II at the International Criminal Court* (ICC). This was the second case before the ICC regarding the situation in the Democratic Republic of the Congo.

The Accused were alleged to have committed three crimes against humanity (murder, sexual slavery and rape) and seven war crimes (using children under the age of 15 to take an active part in hostilities; deliberately directing an attack on a civilian population; wilful killing; destruction of property; pillaging; sexual slavery and rape).

On 17 December 2012, Chui was acquitted of all charges against him with Judge Bruno Cotte stating that the Prosecution had not proven beyond reasonable doubt that the Accused was responsible for the crimes committed, and that evidence presented had been “too contradictory and too hazy”. On 7 March 2014, Katanga was 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). The Chamber acquitted Katanga of the other charges that he was facing.

## International Criminal Tribunal for the Former Yugoslavia

**Ten years ago…**


*President Meron*

On 3 November 2004, the President of the ICTY Judge Theodor Meron, granted the early release of Miroslav Tadić "as soon as is reasonably practicable".

Miroslav Tadić was found guilty by virtue of his individual criminal responsibility on one count of crimes against humanity (persecutions) and sentenced to eight years of imprisonment on 17 October 2003. In reaching his decision, the President "considered Rule 125, incorporated by reference in Article 7 of the Practice Direction, which enumerates some of the factors to be taken into account when examining an application for early release, such as the gravity of the offence, demonstration of rehabilitation, any substantial co-operation with the Office of the Prosecutor, treatment of similarly situated prisoners, and further criteria identified in prior orders and decisions relating to early release".

Pursuant to Article 5 of the Practice Direction, after consulting Judge Mumba the only member sentencing Trial Chamber still in service and based on the Accused's collaboration in the proceedings of the Tribunal, Judge Meron granted the early release to Miroslav Tadić.

## International Criminal Tribunal for the Former Yugoslavia

**Fifteen years ago…**

*Massimo d'Alema*

On 29 November 1999, the Prime Minister of the Republic of Italy, Massimo d'Alema, made an official visit to the seat of the ICTY. During his visit, D'Alema underscored the soundness of his country's support for the institution.

Accompanied by Giorgio Testori, Ambassador of Italy to The Netherlands and several of his close colleagues, D'Alema met with the President of the Tribunal, Judge Claude Jorda, the Registrar, Dorothee de Sampayo, and the Deputy Prosecutor, Graham Blewitt. President Jorda expressed the gratitude of the Tribunal and pointed to the exemplary and multi-facetted support provided by Italy to the institution ever since it was established. President Claude Jorda recalled that the first President of the Tribunal was the Italian Judge Antonio Cassese and that in December 1993, Italy was the first United Nations Member State to adopt a law on co-operation with the ICTY. President Jorda also noted that in February 1997, Italy signed the first ever Agreement on the Enforcement of Penalties imposed by the Tribunal.

President Jorda emphasised that Italy's unfailing co-operation with the mission of the International Criminal Tribunal was in line with the active role it has always played in support of the establishment of a permanent International Criminal Court whose statute proudly boasts the name of Rome, the city where it was adopted.

## International Criminal Tribunal for Rwanda

**Fifteen years ago…**

On 4 November, 1999 the ICTR Appeals Chamber granted an appeal by Jean-Bosco Barayagwiza for his immediate release from the Tribunal's custody since his fundamental rights were violated by his prolonged detention without trial, as a result of actions by the Prosecutor.

Barayagwiza was a Director of Political Affairs in the Ministry of Foreign Affairs of Rwanda at the time of the genocide. He was also a founding member of the Radio Télévision Libre des Milles Collines and charged with six counts of genocide. He pleaded not guilty to these charges on 23 February 1998. On 3

November 1999, the Appeals Chamber sitting in The Hague, unanimously dismissed the indictment "with prejudice to the Prosecutor" and instructed the Registrar to make the arrangements for the delivery of Barayagwiza to the Authorities in Cameroon. In its decision, the Appeals Chamber, after verifying the Statute of the Tribunal and various international human rights laws that guarantee the rights of Accused persons, concluded that the Prosecutor failed "in her duty to take the steps necessary to have the Appellant transferred to the Tribunal's custody in a timely fashion".

# NEWS FROM THE REGION

## *Bosnia and Herzegovina*

### Bosnian Cleared of Abusing Serb Civilians

The Bosnian State Court acquitted former police officer Hariz Habibović of torturing and abusing prisoner Ladimir Dragić, when he was detained in Stupari in June 1992. The prisoner committed suicide afterwards. The Court found that the Prosecution was unable to prove that Habibović was guilty.

*Judge Jesenković*

Judge Vesna Jesenković stated that the Prosecution had based its case on a deceased witness who allegedly saw the abuse. However, the statement given to the police in Kozluk in 2005 had a different description, indicating "that he couldn't see who abused Dragić because that room was dark". Habibović was indicted together with eight other policemen and soldiers from Kladanj area, who are still on trial.

## *Kosovo*

### EU Announces Investigation in Kosovo

The European Union's Foreign Policy chief Frederica Mogherini said that an independent legal expert will look into corruption allegations connected to the EU's rule-of-law mission in Kososovo, EULEX. The mission deals with cases of organised crime, corruption and war crimes which are considered too sensitive to be handle by the Kosovo Judiciary institution. The allegations of corruption were raised at the end of October, when an EULEX Prosecutor, Mariah Bamieh, Accused Judge Franscesco Florit of accepting a 300,000 Euro bribe. Florit denied all of the accusations.

*Frederica Mogherini*

German Members of the European Parliament, Elmar Brok and Ulrike Lunacek expressed their opinion on the situation and indicated that "[i]f the allegations were to be confirmed, the credibility of the EULEX mission and of the EU in Kosovo are at stake". The legal expert appointed to investigate the allegations of corruption is Jean Paul Jacqué, a senior legal adviser to the EU, he will conduct a four-month review of the

## *United Kingdom*

### General Krstić requests Compensation from the UK government

After being convicted by the ICTY in 2001, General Radislav Krstić was sent to the United Kingdom to serve his sentence. In 2010 three Muslim inmates stabbed him in the neck whilst he was in his cell in a high security prison in Wakefield, West Yorkshire. His attackers, who were already serving life sentences, were sentenced to additional life sentences for the attack on Krstić.


*Radislav Krstić*

Krstić has now requested £120,000 (approximately €150,000) in compensation from the British government because the guards failed to protect him from the attack. His lawyer, Adam Sandell, told the Central London County Court that Krstić is still suffering from post-traumatic stress disorder as a consequence of the attack. He is quoted as saying that "they held Krstić down and cut his head and neck with their weapon, he understood that the prisoners were trying to kill him. The three prisoners then left, saying "he's finished", meaning that they believed he would die from the injuries they had inflicted on him".

In response, lawyers for the British Ministry of Justice claimed that prison staff did all they could to protect Krstić and that he was held in the same conditions as the rest of the inmates. As a result of the attack, the ICTY relocated Krstic back to the UN Detention Unit in The Hague and earlier this year he was transferred to serve the rest of his sentence in Poland. The court in the London will make a ruling in the case for compensation as a later date.

# NEWS FROM OTHER INTERNATIONAL COURTS

## *Extraordinary Chambers in the Courts of Cambodia*

*By Sophie Dawson, Nuon Chea Defence Team Intern*

*The views expressed herein are those of the authors alone and do not necessarily reflect the views of the ECCC.*

### Case 002

At the first substantive hearing of Case 002/02 on 17 October, the Accused Nuon Chea and Khieu Samphan informed the Trial Chamber that they had instructed their Counsel not to attend any future evidentiary hearings until ongoing problems were adequately addressed and both Defence teams left the courtroom before proceedings were formally adjourned. Accordingly, neither the Accused nor their Counsel attended the Trial Management Meeting of 21 October.

Following an order of the Trial Chamber, both Defence teams attended the next Trial Management Meeting on 28 October to discuss their concerns, as well as respond to the Co-Prosecutors' request for Amicus Counsel to be appointed to replace the Accused's Counsel of choice. At this meeting, Nuon Chea's Defence team confirmed it would continue to abide by the client's instruction to boycott the Case 002/02 substantive hearings until a special judicial panel had rendered a decision on its motion to have four of the five Trial Chamber Judges in Case 002/02 disqualified, as Cambodian law requires proceedings to be stayed in this event.

Khieu Samphan's Defence team announced it would maintain its client's position not to participate in the Case 002/02 proceedings until it had finalised its appeal against the judgement in Case 002/01. Representatives of the Defence Support Section and both Defence teams also informed the Trial Chamber that appointing amicus curiae was an impractical solution, as both Nuon Chea and Khieu Samphan have expressed their unwillingness to participate in proceedings without their current counsel and in any event, it would take several months to recruit appropriate counsel and many more for those Counsel to become familiarised with the case.

The Trial Chamber dismissed these legal concerns in a decision dated 31 October and ordered both Defence teams to appear at evidentiary hearings commencing on 17 November. The order also provided notice that continuing the boycott would result in 'firm action'.

The Nuon Chea Defence team ceased boycotting Case 002/02 substantive hearings after a decision was rendered on its motion to have four of the five Trial Chamber Judges in Case 002/02 disqualified. In a

decision dated 14 November, the Special Panel of Judges dismissed Nuon Chea and Khieu Samphan Defence teams' applications to have President Nil Nonn and Judges Ya Sokhan, Jean-Marc Lavergne and You Ottara disqualified from adjudicating Case 002/02. The Special Panel also dismissed an application by Khieu Samphan's Defence team to disqualify Judge Claudia Fenz from Case 002/02 proceedings. The Nuon Chea Defence team resumed its participation in Case 002/02 proceedings on 17 November after receiving this decision.Khieu Samphan was present at the hearing on 17 November but his Defence team was not. He informed the Trial Chamber that he had instructed his lawyers to focus all their efforts on preparing his appeal brief against the Case 002/01 trial judgement. After that, they will participate in the Case 002/02 trial. President Nil Nonn warned that if Khieu Samphan continues to instruct his Counsel not to participate in future proceedings, the Trial Chamber may move to redesignate his existing Counsel of choice as court-appointed Counsel, appoint amicus curiae, or take any other action deemed appropriate. While Khieu Samphan maintained that he has the right to appoint his own Counsel, President Nil Nonn explained that this right is not absolute and is subject to limitations.

### Case 003 and Case 004

The Case 003 Defence team continues to prepare submissions to protect their client's fair trial rights and continues to review publicly available material, since the Case File remains inaccessible. Similarly, the three Defence teams in Case 004 continue to protect their clients' rights, particularly while attempting to gain access to the Case File and preparing their defence with publicly available resources.

## *International Criminal Court*

*Letícia Borges Thomas, Office of the Public Counsel for the Defence*

*The views expressed herein are those of the author alone and do not reflect the views of the ICC.*

### Prosecutor v. Bosco Ntaganda (ICC-01/04-02/06)

#### Trial Chamber VI: Reasons for Review of Registrar's Decision on Defence Resources

On 29 October, a Majority in the Ntaganda Trial Chamber filed its reasons for reversal of a Registrar's Decision on Defence resources. The Majority Decision considered the principle of equality of arms, the size of the case and the right of the Accused to an effective Defence, and ordered the Registry, "to make available to the Defence, without delay, the funds for a second legal assistant for the duration of the trial phase, up until closing statements".

Ntaganda was declared indigent by the Registry in 2013 and became entitled to legal assistance funded by the Court. Following that decision, the Defence submitted a request to the Registry seeking additional resources to hire a second legal assistant for the duration of the proceedings. While granted for the initial phase (up until a Confirmation of Charges Decision), subsequent applications were authorised only for a period of six months.

The Defence submitted, and the Majority accepted, that more resources would actually be required during the trial phase and that "[r]ecruiting highly qualified and committed jurists is simply not possible without the ability to offer some kind of employment security". In coming to its Decision, the Majority addressed the need to ensure adequate legal representation and recalled language of the Registry's Single Policy Document on the Court's Legal Aid System stating:

"The Court's legal aid system and decisions by the Registrar are governed by five principles, the first of which - significantly - provides for 'equality of arms': 'The payment system must contribute to maintaining a balance between the resources and means of the Accused and those of the prosecution.'"

The Majority found that the Registrar's Decision did not provide adequate justifications or considerations, leading it to hold that the Decision was unreasonable and "a misuse of its discretion".

Judge Ozaki submitted a Dissenting Opinion, holding that the Majority's reasoning was inadequate given the wide discretion enjoyed by the Registrar in such decisions.

## The Prosecutor v. Bemba *et al.* (ICC-01/05-01/13)

### ICC Pre-Trial Chamber II Confirms Charges Against all Five Suspects

*Jean-Pierre Bemba Gombo*

On 11 November, Pre Trial Chamber II issued its "Decision pursuant to Article 61 (7)(a) and (b) of the Rome Statute" and confirmed, in part, the charges against all five suspects in the Article 70 contempt case of *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, committing the five suspects to trial.

Pre-Trial Chamber II found that there was sufficient evidence to establish substantial grounds to believe that offences against the administration of justice, as provided under Article 70(1)(a)-(c) of the Rome Statute, together with Article 25(3)(a)-(c), may have been committed between late 2011 and November 2013. The Chamber was "satisfied that the [Prosecutor's] allegations are sufficiently strong to commit [the Accused] for trial". Accused Jean-Pierre Bemba, his former Defence lawyer (Aimé Kilolo Musamba), his former case manager (Jean-Jacques Mangenda Kabongo), his former Chief of Staff (Fidèle Babala Wandu) and a listed witness in the main case (Narcisse Arido), are charged with allegedly presenting false evidence and corruptly influencing witnesses to provide false testimony in the main case of Prosecutor v. Jean-Pierre Bemba Gombo (ICC-01/05-01/08). Based on Defence arguments of new charges, the Judges decided that the charges will be only "as they have been presented in the DCC", which excluded allegations of "interfering" and confined their Decision to charges of "corruptly influencing a witness".

The Pre-Trial Chamber declined to confirm the charges brought by the Prosecutor related to the presentation of false or forged documents under the argument that "the evidence also includes pieces that support the claim that the suspects concerned did not know of the falsity of the Documents and did not use them in bad faith within the context and for the purposes of the Main Case". With regard to the decision to decline part of the charges in connection with the witnesses, the Pre-Trial Chamber did not accept the Prosecutor's view that the Suspects participated in a common plan as indirect co-perpetrators to defend Bemba. It held that due to the specific nature of the offences, "the mode of liability of co-perpetration, rather than indirect co-perpetration, captures their conduct more appropriately"; however, the allegations of individual contribution and involvement of the suspects differs for each. For the same reasons, the Chamber also declined to consider the residual form of criminal liability under Article 25(3)(d).

In its Decision, the Chamber rejected requests to stay the proceedings called for in the Defence submissions in objecting to discrete aspects of the pre-trial proceedings. This Decision did not address the interim release of four of the Accused as previously ordered on 21 October. Bemba, the fifth suspect in this case, remains in detention in connection with ongoing proceedings in his Main Case.

*Fidéle Babala*

On 14 November, the Pre-Trial Chamber granted an urgent request of the Babala Defence to set the five-day limit for any Notice of Appeal of this Decision, pursuant to Rule 155(1), to begin tolling from the date of notification of the French translation (ICC-01/05-01/13-756).

## *Special Tribunal for Lebanon*

*STL Public Information and Communications Section*

*The views expressed herein are those of the author(s) alone and do not necessarily reflect the views of the STL.*

**Prosecutor v. Ayyash *et al.* (STL-11-01)**

On 20 October, witness "PRH507", who was granted protective measures, testified from the STL courtroom. He is an expert in jammers with thirty years of experience in designing, building and repairing jammers. PRH507 provided approximately ten jamming systems for Hariri from 1995 to 2005. He was also in charge of the maintenance of the jammers. The Prosecution examined the witness about his professional relationship with Hariri and the specificities of the equipment. The witness also testified about possible triggering mechanisms of the explosives used on 14 February 2005. Defence Counsel for Badreddine began his cross-examination of PRH507 the same day.

On 21 October, Defence Counsel for Ayyash, Badreddine and Merhi cross-examined PRH507 about the possibility of overcoming jamming devices and whether or not car alarm systems could have been used as a method to overcome the jamming systems and detonate the explosives.

On 22 October, a Prosecution witness, identified by the pseudonym "PRH256", appeared before the Trial Chamber. The witness, who was employed as a driver for the Hariri family, was driving a vehicle in the Prime Minister's convoy on the day of the attack. He told the Court about the aftermath of the explosion. He said that the blast resulted in his car colliding with the car in the front. He exited the vehicle, which was surrounded by black smoke, and was hit by another vehicle coming to the crime scene. PRH256's testimony focused also on the route taken on 14 February 2005 and on the functioning of the jamming systems.

The LRV questioned PRH256 on the physical and mental harm resulting from the attack. The witness explained that he was initially reported dead. The explosion resulted in burns, damage to an eye and an ear, in addition to a fractured ribcage, as well as other nervous and psychological symptoms that are ongoing. Counsel for Badreddine asked the witness about the distance between the convoy cars and the effect of the distance on the functioning of the jamming systems. Counsel for Sabra explored with the witness the route taken on the day of the attack, as well as the security arrangements inside the country and the area where the crime occurred. Counsel for Ayyash cross-examined the witness the following day, focusing on the jammers.

On 23 October, the Trial Chamber adjourned the hearing in the *Ayyash et al.* case until Tuesday 11 November.

In the hearing on 11 November, the Prosecution provided an overview of the evidence that is expected to be presented in the next stage. Counsel for the Prosecution indicated that the second part of the case comprises twelve sections. The first of those relates to background evidence of certain political events and developing tensions, which may help understand the progress of the criminal conspiracy. This, according to the Prosecution, provides an underlying rationale for the assassination of Hariri.

In the month of October, upon the LRV's request and following a decision by the Trial Chamber, the identity of one victim participating in the proceedings (VPP) was re-classified from confidential to public. The VPP is Sanaa El Cheikh.

On 28 October, the Registry's Victims' Participation Unit (VPU) submitted to the Pre-Trial Judge (PTJ) two additional applications from persons who were previously unaware of the possibility to apply for the status of VPPs in the Ayyash et al. proceedings. As required by Rule 51(B)(iii) of the RPE, the VPU has verified that these applications are complete and transmitted them to the PTJ for determination.

On 11 November, Prosecution witness Mohammed Mneimneh gave live evidence before the Trial Chamber. He was Assistant to the Chief of the Protocol Department of the Hariri family at the material time. The witness testified about his role in the Protocol Department, Hariri's daily schedule and lifestyle, former Prime Minister's agenda and the logbook of the visitors who came to his residence. In particular, the

Prosecution focused on Hariri's schedule in the weeks prior to his assassination.

After the conclusion of Mneimneh's examination-in-chief, Counsel for Badreddine cross-examined the witness. The Badreddine Defence asked the witness whether he knows certain individuals whom he named (including Wissam Al Hasan, the former Security Chief of the Hariri family). Badreddine Defence's cross-examination, which continued on 12 November, also revolved around Hariri's agenda in the weeks prior to 14 February 2005. Counsel also asked the witness about the certain visits unannounced in Hariri's agenda.

Maarouf El Daouq testified before the Trial Chamber on 12 and 13 November. El Daouq was the Head of the Press Office of the President of Council of Minister when Hariri was Prime Minister. His testimony focused on the role of the office, the drafting, publishing and circulation of press releases, as well as their format and layout. The Prosecution focuses on certain news announced by the Press Office at the material time.

On 13 and 14 November, the parties discussed the admission of certain documents related to the first part of the Prosecution's case and to the testimony of Marwan Hamade. The Trial Chamber issued an oral decision ruling on 14 November, ruling that it will hear the evidence of Marwan Hamade in the week of 17 November as foreshadowed. Hamade is a member of the Lebanese Parliament and a former minister in different cabinets. He survived an assassination attempt on 1 October 2004.

## Contempt Case against AL JADEED [CO.] S.A.L./NEW T.V. S.A.L. (N.T.V.) Karma Mohamed Tahsin Al Khayat and (STL-14-05)

On 24 October, the Defence for NEW TV and Khayat requested that the Amicus disclose to the Defence the reports he submitted to the initial Contempt Judge, Judge Baragwanath, prior to the issuance of the order in lieu of an indictment on 31 January 2014. The Defence also requested the present Contempt Judge, Judge Lettieri, to order the reclassification of all the other filings as public and/or confidential, with the proper redactions for each of those, if necessary. The Defence claims this is material to its preparations. Counsel for Al Khayat and Al Jadeed stress the principle of transparency in the conduct of proceedings. In a response filed on 30 October, the *Amicus* observed that the Defence's request should have been filed before the original Contempt Judge, Judge Baragwanath, instead of Judge Lettieri, who has no access or authority over the *Amicus*' reports. He further argued that the Defence has no right to access internal investigative material/ internal material pertaining to the investigation and that there is no justification for reclassification, on any basis, of the sought materials. According to the *Amicus*, the Defence request is a 'generic fishing expedition'. The *Amicus* Prosecutor held that the Defence Motion should be dismissed in its entirety.

## News Update

### The Head of the Defence Office visits Lebanon

The Head of the STL Defence Office, François Roux, and the Deputy Head of the Defence Office, Héleyn Uñac, visited Lebanon from 13-17 October. During their mission they met the Lebanese Prime Minister, Tammam Salam; the Minister of Justice, Ashraf Rifi; the Minister of Information, Ramzi Joreige; the Chairmen of the Beirut and Tripoli Bar Associations; the Dean of the Lebanese University; and other officials, including the Director of General Security, Ibrahim Abbas, and Walid Jumblatt. During their visit, they spoke with members of the Beirut Bar Association Committee, which is following the work of the STL, as well as with lawyers from the Tripoli Bar in Batroun, students participating in the Inter-University Programme and members of different Lions Clubs in Beirut.

### Training on Monitoring Trials for NGOs

The first part of a training programme organised by the STL on trial monitoring for NGOs successfully took place in the Maison de l'Avocat at the Beirut Bar Association from 29-31 October. Fifteen representatives of active NGOs in the country took part in the training where a number of key speakers discussed the principles and practical elements related to monitoring international criminal proceedings.

The event allowed participants to broaden their knowledge on the topic of monitoring trials at the international level by interacting with the speakers and gaining hands-on experience. The second part of the training will take place in the Netherlands at the end of November.

### Visits

In the month of October the STL received several students from different universities. The STL welcomed the students of the VU University of Amsterdam enrolled in the international Law Master's programme. Following that, students from both The Hague University of Applied Sciences and the Leiden Campus of the Webster University visited the STL.

## DEFENCE ROSTRUM

### Is Gaza Still Occupied?
**- A Decade-Long Debate -**

*By Alessandra Spadaro*

On 6 November, following a preliminary examination, the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) issued a report in response to the referral received by the Union of the Comoros regarding the Freedom Flotilla incident. The OTP concluded that it is reasonable to believe that war crimes were committed by the Israeli Defence Forces (IDF) on the Mavi Marmara, one of the boats of the Flotilla that were trying to break the Israeli blockade and deliver humanitarian aid to the Gaza Strip in May 2010. However, according to the OTP, the incident, which resulted in the death of ten civilians, is not of sufficient gravity to justify an investigation.

Regardless of the decision not to seek any further action by the ICC, what is most interesting about the report of the OTP is that it characterises the Israel-Hamas conflict as an international armed conflict (IAC) in view of the continuing occupation of Gaza by Israel, thus embracing the view of the majority of the international community on this matter. In fact, while Israel claims that the withdrawal of its troops and citizens in 2005 effectively terminated the occupation, as it no longer exercises effective control over Gaza, the prevalent view among the international community is that the Strip is still subject to belligerent occupation.

The issue whether Gaza is occupied or not is relevant for the classification of the conflict as international or non-international in nature, and, as a consequence, for the application of different sets of International Humanitarian Law's (IHL) rules. In general, IHL offers a greater degree of protection to those affected by or participating in the hostilities in case of an IAC. On the one hand, only few treaty rules apply to Non-International Armed Conflicts (NIACs). In fact, NIACs are governed by Common Article 3 to the Geneva Conventions and by Additional Protocol II. On the other hand, IACs are regulated by hundreds of treaty rules, encompassing the Hague Regulations, the four 1949 Geneva Conventions and the 1977 Additional Protocol I to the Geneva Conventions.

Article 42 of the 1907 Hague Regulations (Article 42) reads that a territory is occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the area were such authority has been established and can be exercised. Hence, a territory is occupied when a foreign army can display effective control over it. In the Armed Activities case (*Democratic Republic of the Congo v. Uganda*), the International Court of Justice (ICJ) gave a restrictive reading of Article 42 and held that the foreign army must actually exercise authority in the territory, thus replacing the sovereign govern-

ment. The ICJ found that the areas falling beyond the scope of authority of the central government, where foreign forces were present but not exercising authority, were not occupied. According to some commentators, on the one hand such a restrictive view introduces a rigorous standard to ascertain the existence of an occupation, on the other hand, it creates a legal black hole in those areas in which neither the foreign army nor the legitimate government are considered responsible for protecting human rights and basic needs of the population.

In line with the ICJ's position, the Israeli Supreme Court sitting as High Court of Justice ruled that Israel is no longer occupying Gaza, as it has no effective capability to enforce law and to order and manage the civilian life in the Strip.

A different and less strict standard has been embraced, by the ICTY in the *Naletilić* case, by the US Military Tribunal in Nuremberg in the *Hostages case (US v. List)*, by the US Army Field Manual and by the Israeli Supreme Court in the *Tsemel* case.

As a matter of fact, an expansive reading of the laws of occupation only requires the foreign army to have the capability to exercise effective powers over the territory and to make its authority felt, even with no boots on the ground. In light of this more flexible approach, despite the 2005 disengagement, Israel still qualifies as an occupier, as it expressly retains the right to reenter Gaza at will and has the ability to do so within a reasonable time. Contrarily, it has been argued that the IDF only engages in military operations in the Strip for security reasons and does not aim to make its authority felt by the population or to regain full control over the Gazan territory.

However, the prevalent view among the international community is that even in absence of a constant military presence, Israel still effectively controls Gaza by displaying its authority over the borders, maritime zone and airspace of the Strip, thus managing the flow of people and goods. Furthermore, the Israeli Supreme Court sitting as High Court of Justice in the al Bassiouni case ruled that Israel, despite not being an occupying power any longer, still has the duty to supply the Gazan population with water, fuel and electricity, because of the situation of dependence that decades of military occupation have created. Yoram Dinstein, a well-known Israeli scholar, has argued in this respect that the only reason for which Israel is obliged to provide supplies to its enemy's population is that indeed the occupation is not over.

Moreover, some commentators argue that the West Bank and Gaza form a single political unit. Therefore, Israel, by occupying part of the West Bank, can also be deemed as the occupying power in Gaza. However, Gaza and the West Bank are being administered separately since Hamas' takeover in the Strip in 2007. Even considering both as a single political unit, Gaza and the West Bank are geographically detached and, according to the literal meaning of Article 42, occupation is a factual situation regarding only those areas where foreign authority has been established and can be exercised.

In light of these opposing arguments, a fair evaluation of the situation could be the following. Israel does exercise some control over Gaza, but in a mild way that falls short of the level of control that occupying powers exercise on the basis of the effective control test. Moreover, Israel does not have the possibility nor does it wants to enforce law and order in Gaza on a daily basis. An excessively liberal interpretation of the laws of occupation would result in Israel being required to assume full responsibilities of an occupying power without being able to do so. Conversely, the Palestinian government does exercise some control over Gaza as well, but again falling short of the degree of authority that an independent and sovereign government should enjoy over its territory. However, the adoption of the ICJ's formula expressed in the Armed Activities case would result in an equally unfair outcome, as Israel would not be bound by its duties towards the Gazan population in spite of its pregnant control over the Strip.

Despite the doubts regarding the applicability of Article 42 to the current situation in Gaza, it should be noted that, according to the International Committee of the Red Cross (ICRC), Article 6 of the Fourth Geneva Convention of 1949 (Article 6 GC IV) uses the word "occupation" in a broader sense than Article 42 of the Hague Regulations. In the ICRC's view, Article 6 GC IV is designed to provide the maximum protection for the civilian population and applies when a stable situation of full administration like the one provided for in Article 42 of the Hague Regulations is not established. For the ICRC, a different interpretation of Article 6 GC IV would be not only redundant but also

inequitable, as it would create a gap in the protection of civilians.

Israel has constantly opposed the de jure applicability of GC IV to the Palestinian territories, despite applying it *de facto*. However, the opposite view has been expressed throughout the years by the majority of states, the United Nations, the ICRC and the ICJ. In the Advisory Opinion regarding the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the ICJ held that GC IV is de jure applicable in the West Bank, which was under the control of Jordan when the conflict broke out in 1967, as both Israel and Jordan were parties to the Convention at that time. Likewise, the same reasoning can be applied to Gaza, which used to be controlled by Egypt, also a party to GC IV.

In conclusion, Article 42 of the Hague Regulations seems ill-suited to be applied in Gaza, as such situation appears to be falling in a legal grey zone, in which the requirements set by the laws of occupation are hardly met in reality. This is a matter of lex lata as opposed to lex ferenda, which can only be untangled with the creation of new standards to solve this sort of "awkward legal situations". However, IHL still provides protection to the Palestinian population in Gaza by means of the Fourth Geneva Convention as interpreted by the ICRC, in spite of the Israeli position in this respect.

## ADC - ICTY Field Trip to Eurojust

*By Lisa Stefani*

On 24 October, a group of ADC-ICTY interns visited Eurojust. A staff member of the Press and PR Service, Leen De Zutter, gave a presentation about the creation of the organisation, its purpose and future plans for the European agency.

Eurojust aims at stimulating and improving the coordination of investigations and prosecution of organised crimes, such as terrorism, drug trafficking, smuggling, cyber-crimes, fraud and more. The organisation initiates its activities only when two or more European countries (or State Partners) are involved and when dealing with serious cross-border organised crime. Without the assistance of Eurojust, the cooperation would be difficult since each country has its own legal system. Even though the freedom of movement in the Schengen area allows people to cross the borders freely, there is no common police or Prosecutor, creating a need to coordinate steps in order to deal with cross-border crime.

Twenty-eight national members participate in the coordination meetings. Experienced Prosecutors, Judges and police officers, supported by deputies, assistants or seconded national experts compose the college. During the meetings they open, close and check the status of the cases.

Eurojust also cooperates with Norway and United States, which have their Liaison Prosecutors represented in the organisation; they offer their experience and knowledge in cases where they are involved. Eurojust has signed cooperation agreements with various international organisations, such as Europol, Interpol, Frontex, etc.

When a new case is sent by a country, Eurojust asks the authorities of the affected Member States, which country is in a better position to lead the case, investigate, prosecute or set up a joint investigation team and provide Eurojust with the necessary information. Eurojust ensures that Member States inform other countries involved in ongoing investigations and the agency assists in their coordination. Eurojust also provides assistance to local authorities present in the field by exchanging information in real time, for example during an arrest.

States from Asia and South America often visit the organisation as they envisage to set up a similar organisation in their area; at the moment Eurojust is unique in the type of work it does, which remains an extraordinary model in the world.

Concerning the future of this agency, the European Commission proposed to create a European Public Prosecutor's Office in order to strengthen the protection of the European Union budget by improving the enforcement of offence affecting the EU's financial interests.

The ADC-ICTY interns would like to thank Leen De Zutter and Eurojust for the informative presentation and their generosity with their time.

# BLOG UPDATES AND ONLINE LECTURES

## Blog Updates

Rosemary Grey, **ICC asked to investigate Australia's treatment of asylum seekers,** 25 October 2014, available at: http://tinyurl.com/o6w2moc.

Julien Maton, **International Criminal Courts: Progress Made, Progress Needed**, 1 November 2014, available here: http://tinyurl.com/myh7kf8.

Adam Wagner, **HRW: Israel displayed "callous indifference" in deadly attacks on family homes in Gaza**, 5 November 2014, available at: http://tinyurl.com/ko7pf3s.

Theodor Schilling, **The dust has not yet settled: the Italian Constitutional Court disagrees with the International Court of Justice, sort of,** 12 November 2014, available at: http://tinyurl.com/ng9xjl2.

## Online Lectures and Videos

*"International Law in Times of Conflict",* by Vrije Universiteit Amsterdam, 4 November 2014, available at: http://tinyurl.com/olo6465.

*"International Law and the Pedagogy of Violence",* by Harvard University, 5 November 2014, available at: http://tinyurl.com/pl4gfre.

*"Rubin International Lawn Symposium",* by New York University School of Law, 10 November 2014, available at: http://tinyurl.com/ndskv34.

*"Wrongful Convictions"*, by New York University School of Law, 13 November 2014, available at: http://tinyurl.com/mesk509.

# PUBLICATIONS AND ARTICLES

## Books

Sébastien Chartrand & John Philpot (2014), *The Unbalanced Scales of International Criminal Justice*, Baraka Books.

Ilias Bantekas & Emmanouela Mylonaki (2014), *Criminological Approaches to International Criminal Law*, Cambridge University Press.

Leena Grover (2014), *Interpreting Crimes in the Rome Statute of the International Criminal Court*, Cambridge University Press.

Michael Newton, Larry May (2014), *Proportionality in International Law,* Oxford University Press.

## Articles

Adrian M. Plevin (2014), "Beyond a "Victim's Right": Truth-Finding Power and Procedure at the ICC", *Criminal Law Forum Journal,* Vol. 25, No. 4.

Ingo Venzke (2014), "What Makes for a Valid Legal Argument?", *Leiden Journal of International Law*, Vol. 27, No. 4.

Phil C. W. Chan (2014), "China's Approaches to International Law since the Opium War", *Leiden Journal of International Law,* Vol. 27, No. 4.

Ronald J. Allen (2014), "Burdens of Proof", *Oxford Journal of Law, Probability and Risk,* Vol. 13, No. 4.

# CALL FOR PAPERS

The **European Society of International Law** has issued a call for papers to be considered for its upcoming conference on "The Judicialisation of International Law".

Deadline: 31 January 2015 More Info: http://tinyurl.com/ozgr2pa.

The **European Society of International Law** has issued a call for papers for its Annual Conference on "Dreaming of the International Rule of Law—A History of International Courts and Tribunals".

Deadline: 15 February 2015 More Info: http://tinyurl.com/o5vkxnj.

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## EVENTS

Conference: The Defence in International Criminal Courts
Date: 3 - 5 December 2014
Location: Hessisches Staatsarchiv Marburg, Germany
More Info: http://tinyurl.com/nj8cqld.

ICDL Annual Meeting "Defence Counsel at the International Criminal Tribunals"
Date: 24 January 2015
Location: InterContinental Hotel, Berlin
More Info: http://tinyurl.com/pm3m7bq.

IBA Annual Conference on International Criminal Law: International Challenges for 2015
Date: 31 January - 1 February 2015
Location: Peace Palace, The Hague
More Info: http://tinyurl.com/ng9oqcc.

## OPPORTUNITIES

Associate Investigator (P-2), The Hague
Office of the Prosecutor
International Criminal Court
Closing Date: 23 November 2014

Assistant Trial Lawyer (P-1), The Hague
Office of the Prosecutor
International Criminal Court
Closing Date: 1 December 2014

Trial Counsel (P-3), Leidschendam
Office of the Prosecutor
Special Tribunal For Lebanon
Closing Date: 5 December


*The ADC-ICTY would like to express its sincere appreciation and gratitude to Ružica Ćirić, Antonija Kurbalija and Saba Sekulović for their contribution to the Newsletter we wish them all the best for the future!*