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ICTY Cases

Cases in Pre-trial

Haradinaj et al. (IT-04-84)

Cases at Trial

Đorđević (IT-05-87/1)

Gotovina et al. (IT-06-90)

Karadžić (IT-95-5/18-I)

Perišić (IT-04-81)

Prlić et al. (IT-04-74)

Šešelj (IT-03-67)

Stanišić & Simatović (IT-03-69)

Tolimir (IT-05-88/2)

Župljanin and Stanišić (IT-08-91)

Inside this issue:

ICTY News

Sense[less] Reporting?

Prosecutor v. Mićo Stanišić and Stojan Župljanin, IT-08-91

- Tatjana Savić, Legal Assistant, Stanišić Defence Team

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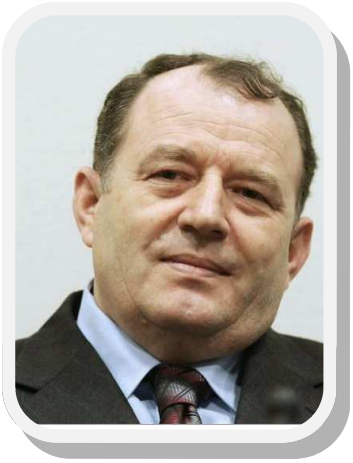
Over the course of the past several days, the issue of improper reporting by the Sense News Agency was raised on two occasions in *Prosecutor v. Mićo Stanišić and Stojan Župljanin* case.



Mićo Stanišić

On 21 October 2010, it was brought to the Trial Chamber's attention, that the Sense News Agency report from the trial was phrased in such a manner that it revealed the identity of a protected witness. On the following day, the former Assistant Minister for Crime Prevention, Dobrislav Planojevic, began his testimony.

The report by the Sense Agency, indicated that compared to the testimony he provided to the Office of the Prosecution, the witness had significantly changed his testimony.

The witness continued with his testimony on 28 October 2010. He reacted to the untruthfulness of the Sense report and requested the assistance of the Trial Chamber. The Trial Chamber informed the witness that they too had seen the article and were surprised by its content. In the Chamber's view, it was up to the Registry to take certain actions in that regard.

By the beginning of the next court session, the Trial Chamber informed the witness that the article had been removed from the website of Sense News Agency.

Prosecutor v. Prlić et al (IT-04-74)

- Habibatou Gani, Defence Intern for Stojić Defence Team

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On 6 October 2010, Trial Chamber III rendered its decision partially granting the Prosecution's request to reopen its case, in light of the discovery of the Mladic diaries. The Chamber ordered that requests for the reopening of Defence cases must be filed no later than 21 October 2010 but with the *proviso* that such requests must not constitute a "general request to re-open their cases". The Stojić Defence sought to file its motion for

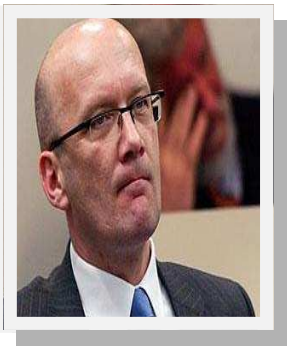
ICTY Cases

Cases on Appeal

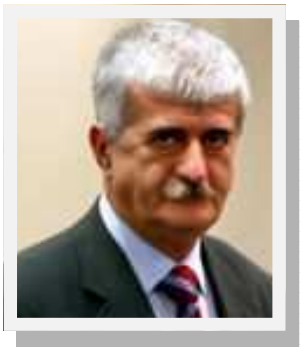
Milan Lukić & Sredoje Lukić (IT-98-32/1)

Popović et al. (IT-05-88)

Šainović et al. (IT-05-87)



Jadranko Prlić



Bruno Stojić

certification to appeal this decision by 20 October 2010. Thus, on 18 October 2010, the Stojić Defence filed a motion, requesting the stay of time limit until the Trial Chamber's determination of their anticipated interlocutory appeal. In short, it argued that should a stay of proceedings or an extension of time limit not be granted, Mr Stojić would be denied his fair trial right to "seek review of the decision". It invited the Trial Chamber to "grant the stay of the time limit to avoid the infringement of Mr Stojić's statutory right to a fair trial". On 19 October 2010, both the Praljak Defence and Petković Defence joined the Stojić Motion.

Trial Chamber III was not persuaded. In its decision, dated 19 October 2010, it stated, *inter alia*, that the mere request for certification to appeal the 6 October 2010 decision, cannot, in itself, justify the need to suspend the execution of the said decision.

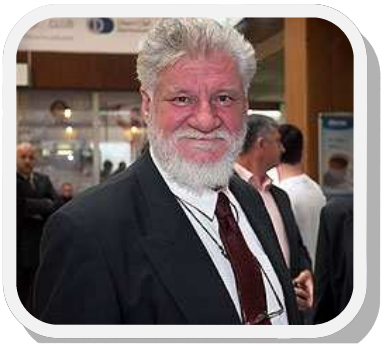
On 20 October 2010 and in accordance with Rule 73(B) of the Tribunal's Rules of Evidence and Procedure, the Stojić Defence filed its request for certification to appeal the 6 October 2010 decision. It alleged that the Chamber's request, limiting the scope of reopening motions, constituted a "*de facto* and premature denial of the reopening of the defence case", a core facet of the rights of the accused. Consequentially, this prevents Defence teams from "putting on a defence through the presentation of evidence". Additionally, it was alleged that the decision was contrary to the equality of arms principle, in so far as exculpatory evidence is *de facto* excluded from admission. Finally, it argued that it had exercised 'reasonable diligence' with regard to the discovery of the Mladić diaries, which should be regarded as fresh evidence.

"the general right to a fair trial offers defendants a powerful tool to go beyond the text of the statute, and to require that the court's respect for the rights of the accused keep pace with the progressive development of human rights law"

- William Schabas, 2010

Trial Chamber III has since rendered its decision regarding the Stojić Defence Motion, requesting certification to appeal. In its decision, dated 27 October 2010, the Chamber reiterated its findings that the Mladić diaries do not constitute fresh evidence. However, it added that 'fresh evidence' also refers to 'newly relevant evidence', including the Mladić diaries and other relevant and probative evidence which, following the admission of evidence has become important.

Slobodan Praljak



On 21 October 2010 the Stojić , Petković and Praljak Defence teams filed their motions to reopen their case, whilst the Prlic Defence team filed a motion rebutting the evidence admitted through the 6 October 2010 decision. In its 27 October 2010 decision, the Chamber gave Defence teams until 3 November 2010 to supplement their requests, filed in response to the admitted Mladić entries, in accordance to the legal requirements of a motion for reopening.

The Prosecutor v. Stanišić & Simatović IT-03-69

- James Jackson, Defence Legal Intern, Karadžić Defence Advisory Team
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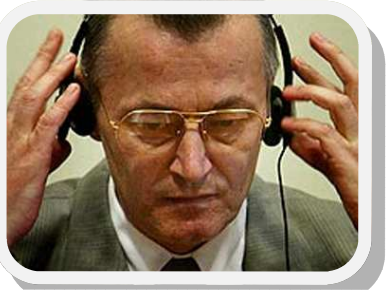

Franko Simatović

Prosecution military expert, Reynaud Theunens, has been testifying in the case of Jovica Stanišić and Franko Simatović, former chiefs of the Serbian state security service. Theunens contends that evidence on the role of the units allegedly under the control of Stanišić and Simatović during the wars in Croatia and Bosnia-Herzegovina can be found in intelligence and other military documents. The Belgian expert has put together his findings in a report; "*Military aspects of the roles of Jovica* Stanišić *and Franko* Simatović *in the conflicts in Croatia and BH from 1991 to 1995*." Theunens was examined by the Prosecutor and provided some explanations about parts of his report, including the roles of Dragan Vasiljkovic, Arkan's Serbian Volunteer Guard and the Red Berets.

Theunens also recently testified at the review of the Šljivančanin appeals judgment, on the operation of the JNA and the likelihood of Panic's claims that Mrkšić failed to inform Panic and Šljivančanin about certain orders.

Prosecutor v. Radovan Karadžić

- Niamh Barry, Defence Legal Intern, Karadžić Defence Advisory Team
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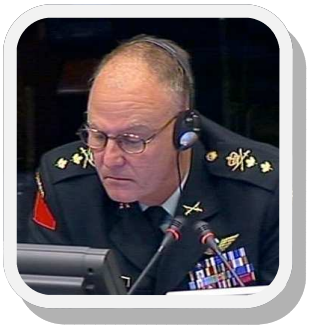
A hearing was held recently with the government of Bosnia-Herzegovina in the case of Radovan Karadžić. The Trial Chamber was concerned over the lack of co-operation on the part of Bosnia-Herzegovina with the Defence team. Presiding Judge O-Gon Kwon said there was "very slow progress" in dealing with Radovan Karadžić's request for documents, which are necessary for his defence. A statement was read in court by the Ambassador of Bosnia-Herzegovina to the Netherlands, Miranda Sidran-Kamisalic, on behalf of the Bosnian government. The statement insisted that the government was fully committed to co-operating with the Tribunal and the reasons behind the slow progress included, among others, that the requests were "imprecise" and too broad. The requests for documents were first made in June 2009. An additional request was made in January 2010. Miranda Sidran-Kamisalic, agreed to report back to the court on the situation within one month.



General David Fraser

General David Fraser, former Military Assistant of the Commander of the United Nations Protection Force, UNPROFOR, in Sarajevo from April 1994 to May 1995, recently testified in the trial. General Fraser stated that, during that period, the Bosnian Serb army prevented humanitarian convoys from reaching civilians. In his cross-examination, Karadžić questioned General Fraser about UN participation in an alleged black marketeering ring. General Fraser replied that an investigation had already been conducted regarding this matter. Karadžić linked controlling the mobility of the humanitarian convoys to the increased need for caution, in light of the aforementioned incidents. When questioned on whether Muslims had filmed attacks on children, in order to jeopardize the reputation of the Serbs, the witness stated "I've heard those stories [...] it would have come from our UN soldiers and I seem to recall that a protest was lodged against Muslims for these types of actions". General Fraser insisted they protested against incidents of Muslims targeting civilians in the same manner as they protested against the Serbs conducting such attacks.

ADC-ICTY Appeals Training

- Ece Aygun, Defence Legal Intern, ADC-ICTY
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On 23 October 2010, the ADC-ICTY organized an Appeals Training for the members of the Association. The training took place at the Bel Air Hotel, with the participation of approximately 30 members of the Association of Defence Counsel practicing before the ICTY. The programme included presentations by Defence Counsels, Michael Karnavas, Gregor Guy-Smith and Colleen Rohan as well as Paul Rogers, Senior Trial Counsel with the of the Office of the Prosecutor at the ICTY.

Participants discussed issues such as: drafting an appeal; the significance of raising motions at the trial stage and post-conviction matters. The training concluded on 24 October 2010 and has received positive feedback from the participants.

The ADC-ICTY Annual General Assembly

- Ece Aygun, Defence Legal Intern, ADC-ICTY

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On 24 October 2010, the ADC-ICTY held its Annual General Assembly. The Assembly discussed the reports of the ADC-ICTY Committees for the past year. A proposal was made to re-instate the *Ad-Hoc* Post-Convictions Committee, to give a defence perspective on post-conviction issues. The General Assembly unanimously agreed to re-instate this committee, and it was re-named the *Ad-Hoc* Post-Tribunal Matters Committee.

The legacy of defence at the ICTY was discussed. Members noted that it was important that the ADC makes efforts to preserve its legacy. It was agreed to initiate a compilation of short stories about "what really happened" written by defence counsel over the years. It was agreed that the Head Office would compile an electronic version of these stories and publish it through the website. The deadline for submission of these short stories was agreed to be September 2011 to fall in line with the planned ICTY Legacy Conference.

The Annual General Assembly was concluded with a vote on the members of the ADC-ICTY Committees.

News from International Courts and Tribunals

International Criminal Court

The Prosecutor v. Callixte Mbarushimana, ICC-01/04-01/10, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana

- Amy Di Bella, Intern, OPCD/ICC

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The Chamber found that there were reasonable grounds to believe that Mbarushimana, along with other members of the Democratic Forces for the Liberation of Rwanda (FDLR), agreed to a common plan to attack civilian populations of the Democratic Republic of the Congo. This plan allegedly included an international campaign aimed at concealing the FDLR's crimes. According to the allegations, Mbarushimana organized and conducted media aspects of the international campaign. The Chamber's flexible interpretation of the original referral (made five years before the events alleged) informs the Prosecutor as to the reach of his power to initiate future investigations.

The decision considers the scope of individual criminal responsibility. The Chamber found reasonable grounds to believe that Callixte Mbarushimana contributed to the common plan discussed above, but nonetheless declined to analyse Mbarushimana as a co-perpetrator because there was insufficient evidence to support a reasonable belief that Mbarushimana had power to "frustrate the commission of the crimes" (para. 36). The Chamber therefore considered residual accessory liability and found that his contribution was intentional and "relevant enough so as to amount to a contribution 'in any other way' in the sense of article 25(3)(d) of the Statute" (para. 41).

Another significant aspect of this decision was the Chamber's statement of the grounds for the arrest. The Chamber was convinced that an arrest warrant was necessary for three alternative reasons: to ensure Mbarushimana's appearance; to protect victims, (potential) witnesses and the prosecutor's ongoing investigation; and to prevent Mbarushimana from continuing to contribute to the criminal activities (para. 50). The justification for the first ground is significant for its implications on the rights of the accused. Through his lawyer, Mbarushimana had provided assurances that he would be immediately available to the Court. However, the Chamber was convinced that Mbarushimana had the means to flee, in particular because he held a French residency permit and could thus travel throughout the European Union. The Chamber also noted that the FDLR international support network could enable Mbarushimana to flee by providing him financial support. While the Chamber did not go so far as to say that possession of a residency permit in the European Union necessitates arrest, it greatly narrowed the possibility of a summons in such circumstances.

The Prosecutor V. Jean Pierre Bemba Gombo ICC-10/05-01/08 Judgment of Mr. Bemba's appeal against the decision on the admissibility of his case of the Appeal chambers on Tuesday 19 October 2010.

- Busingye Sylvia Mbabazi, Visiting Professional, OPCD/ICC
*The views expressed herein are those of the author alone and do not necessarily reflect the views of the International Criminal Court.

Jean Pierre Bemba Gombo

On 24 June 2010, Trial Chamber III dismissed the admissibility and abuse of process challenges, raised by the defence. The Defence filed an appeal against this decision on 28 June 2010. On 19 October, 2010, the Appeals Chamber of the International Criminal Court (ICC) confirmed the decision of Trial Chamber III and confirmed that the case against Mr. Bemba is admissible.

In accordance with article 17(1) (b) of the Rome statute, a case is inadmissible before the ICC where the case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless that decision resulted from the unwillingness or inability of the state genuinely to prosecute. The Appeals Chamber found that the Trial Chamber did not err when it determined that there was no decision not to prosecute within the meaning of article 17 (1) (b) of the Statute. When a Trial Chamber is presented with the question of whether the outcome of domestic judicial proceedings was a decision not to prosecute in terms of article 17 (1) (b) of the Statute, the Trial Chamber should accept *prima facie* the validity and effect of the decisions of domestic courts, unless presented with compelling evidence indicating otherwise, see: the judgment on the appeal of Prosecutor v. Thomas Lubanga Dyilo against the decision on the Defence challenge to the jurisdiction of the court pursuant to article 19 (2) (a) of the Rome.

The decision confirms the willingness of the ICC to accept self-referrals and not to examine the legitimacy of decisions of national authorities to transfer a case to the ICC rather than investigating or prosecuting a defendant in national courts, unless there is a compelling basis to do so. In so doing, the right of the accused person to be tried by his national court is not expressly considered. It will also be interesting to follow the extent to which this jurisprudential trend will remain consistent with the principle of complementarity, according to which the ICC should be a court of last resort.

Extraordinary Chambers in the Courts of Cambodia

- Angus Rennie, DSS at the ECCC
*The views expressed herein are those of the author alone and do not necessarily reflect the views of the Extraordinary Chambers of the Courts of Cambodia.

On 13 October, the Co-Prosecutors filed their appeal against the Trial Chamber's judgement in Case 001. The OCP argues that thirty-five years' imprisonment, reduced to nineteen years in recognition of time already served and prior illegal detention, is 'manifestly inadequate.' The appeal suggests that the Trial Chamber failed to take proper account of the gravity of Duch's crimes, his individual circumstances, and the complex aggravating circumstances at play in his case. It challenges the Chamber's assessment of mitigating circumstances, and refutes the decision not to impose cumulative convictions but rather subsume various offences under a charge of persecution as a crime against humanity. The appeal also suggests that rape charges were incorrectly characterised as torture rather than discrete crimes against humanity. Finally, the appeal argues that Duch should have been convicted of enslaving detainees of the S-21 prison complex, which he managed during the Khmer Rouge regime.

On 18 October, the Supreme Court Chamber granted the Duch defence request to extend the deadline for submission of its appeal brief. In its request, the defence argued, *inter alia*, that significant disparities in resources between the Co-Prosecutors and the defence necessitated granting additional time to prepare the defence appeal. The Supreme Court granted the extension due to the size and complexity of the case and the fact that Duch replaced one of his Co-Lawyers shortly after the verdict was rendered. However, the Chamber dismissed the disparity of resources argument, noting it 'does not constitute good cause…the resources available to the Co-Prosecutors relate to the fact that the OCP has more duties at the ECCC than the Co-Lawyers for the Accused.'
The Supreme Court Chamber remains in deliberation over the Defence Support Section's request for an *amicus curiae* appointment to assist in the proper adjudication of the Case 001 appeals. The request is made out of particular concern for the proper

adjudication of matters relating to international law and sentencing, which the Duch team has stated it does not intend to cover in its appeal, focusing instead on jurisdictional challenges.

In Case 002, the accused have all filed appeal briefs with the exception of Ieng Sary, who was granted an extension. As required by the Court's Internal Rules, each appeal is limited to jurisdictional arguments. In general, the defendants' briefs allege that the Co-Investigating Judges' closing order violates the principle of legality by charging the accused with international crimes which did not constitute offences under Cambodian law at the time of their alleged commission. In addition, the Ieng Thirith defence argues that the OCIJ presented an insufficiently reasoned order, whose arbitrariness violates the Accused's fair trial rights. The Ieng Thirith defence notes in particular the OCIJ's troubling tendency to import into its reasoning Trial Chamber findings from Case 001 on certain occasions while dismissing the Chamber's findings on other occasions, offering supporting grounds for neither disposition.
On 6 October, the Office of the Co-Prosecutors filed with the Pre-Trial Chamber a request to submit a joint response to individual appeal briefs which the four defendants in Case 002 are either preparing or have already submitted. Among other grounds, the OCP notes that the Court's translation services are 'stretched,' and that it would be in the interests of judicial economy to consolidate its response.

In 2009, the ECCC was plagued by reports of Tribunal security staff forced to pay kickbacks to their supervisors. This and other human-resources related corruption allegations in the Court's national offices led to the appointment of Utth Chhorn, head of the Cambodian National Audit Authority, as Independent Counsellor to the Tribunal. Chhorn was mandated to investigate corruption allegations and provide a report to the Government and the UN on his findings. Despite an earlier commitment to publicize the report, which was completed in July, the Cambodian Government and the UN Office of Legal Affairs decided last week that Chhorn's work will remain confidential. Court observers and civil society groups criticized this reversal, arguing that successfully addressing and dismissing corruption at the Court is necessary to preserve the legitimacy of the institution and will only be successful if undertaken in a spirit of openness and transparency.

The decision confirms the willingness of the ICC to accept self-referrals, and to not examine the legitimacy of decisions of national authorities to transfer a case to the ICC rather than investigating or prosecuting a defendant in national courts, unless there is a compelling basis to do so.

-Businge Sylvia Mbabazi

Defence Rostrum

How Can You Defend Such People? The Rights of Defence in International Criminal Tribunals"
- Jovana Parades, Legal Assistant, Karadžić Standby Team, and Taylor Olson, Defence Legal Intern, Karadžić Standby Team

On 27 October 2010, Richard Harvey, Lead Counsel on the Radovan Karadzic Standby Defence Team, addressed an overflowing lecture hall at the T.M.C Asser Institute.

Harvey spoke about the experiences and struggles he faced as a human-rights lawyer in the often controversial field of criminal Defence. He began working in the tribunals when his New York law office partner .decided to represent a Rwandan Mayor accused of genocide at the ICTR. When discussing why he decided to make this bold career move, Harvey stated, "I decided to put my own principles on trial and at the same time to see whether a judicial creation of the United Nations could succeed where national governments had failed and provide fair trials for those already pronounced guilty and condemned as monsters by the international media".

What was made very clear throughout the evening, were the contentious issues that arise from the inequality and treatment of the Defence and the role that they play in international tribunals. As Harvey stated, "those familiar with Plessey v. Ferguson will recognize the term 'separate but equal'. There remains more than a whiff of that sensation about the position of the Defence at international tribunals." Mr. Harvey pointed out that when the tribunals were created, the Defence was an

afterthought. Most of the audience was shocked to learn that when the ICTY first began conducting trials, the Defence was not allowed access to the canteen or even to the library.

Harvey's lecture focused on three areas troubling the Defence at the International Criminal Tribunals.

Firstly, he discussed issues surrounding the disclosure and discovery of exhibits. He pointed out that unlike in national jurisdictions, where the accused receives all evidence prior to trial, in the tribunals it is routine for documents to be turned over to the Defence shortly before - and in some instances the night before – a witness is scheduled to testify. This makes it very difficult to take timely instructions from clients.

Secondly, Harvey noted "tribunal practice leans towards inclusion, rather than exclusion, with Judges regularly agreeing to let in documents and oral testimony saying they will decide later what, if any, weight to give them". As a result, it is difficult to know what will actually be considered evidence in the case.
Lastly, the concept of presumption of innocence was discussed. In jury trials, lawyers may inquire about the juror's views on this fundamental human right. However, at the tribunal there is a sentiment that, once the indictment is confirmed, the duty shifts in some degree to the accused to prove his innocence.

The night became even more exciting when members of the audience posed questions. This led to a contentious and emotional debate at which point two renowned criminal Defence Attorneys, Colleen Rohan and Gregor Guy-Smith, stood up and voiced their views about issues discussed.

Blog Update

- Md. Nazrul Islam Khan, Steven on Trial of War Crimes in Bangladesh, 20 October 2010, available at: http://www.weeklyblitz.net/1043/steven-on-trial-of-war-crimes-in-bangladesh
- Gentian Zyberi, Functional Immunity for Defence Counsel, 10 October 2010, available at: http://internationallawobserver.eu/2010/10/10/functional-immunity-of-defence-counsel/
- Diane Marie Amann, ICC-Kenya-Bashir continued, 27 October 2010, available at: http://intlawgrrls.blogspot.com/2010/10/icc-kenya-bashir-continued.html

Publications

Books

Nancy Armooury Combs, Fact-Finding in International Criminal Law, Cambridge University Press, 2010.

Christine Schuon, International Criminal Procedure: A Clash of Legal Cultures , T.M.C. Asser Press, 2010.

Edited by: Karim Khan, Caroline Buisman, Chris Gosnell, Principles of Evidence in International Criminal Justice, Oxford University Press, 2010.

Articles

Marko Milanovic, Is the Rome Statute Binding on Individuals? (And Why We Should Care) (October 11, 2010). Journal of International Criminal Justice, Vol. 9, No. 1, 2011. Available at SSRN: http://ssrn.com/abstract=1690606

BethVan Schaack, Negotiating at the Interface of Power & Law: The Crime of Aggression (August 30, 2010). Santa Clara Univ. Legal Studies Research Paper No. 10-09. Available at SSRN: http://ssrn.com/abstract=1668661

Last month Kenya permitted Sudan's President Omar al-Bashir, to attend a Constitution Day celebration in Nairobi, notwithstanding that Bashir has been indicted by the ICC.

Opportunities

Special Tribunal for Lebanon (STL)
A Defence Team may have many employment opportunities for jurists, lawyers, investigators and case managers. For more detailed information about these positions and the qualifications required, please consult http://www.stl-tsl.org/sid/136.

International Criminal Court
Legal Officer (P-3)
The Office of Public Counsel for the Defence, Registry
Closing Date: 3 November 2010

Other Organizations
Legal Officer (CICC Legal Section)
Coalition for the International Criminal Court
Closing Date: 7 November 2010

Senior Legal Officer, The Hague (P-4)
Organisation for the Prohibition of Chemical Weapons (OPCW)
Office of the Legal Adviser
Closing Date: Tuesday, 21 December 2010

... are the provisions of the Rome Statute that define international crimes and forms of individual responsibility substantive or jurisdictional in nature?

- Marko Milanovic

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Any contributions for the newsletter should be sent to Dominic Kennedy at dkennedy@icty.org

WE'RE ON THE WEB!

WWW.ADCICTY.ORG

Upcoming Events

- **Bangladesh War Crimes Tribunal - A Wolf in Sheep's Clothing?**

On 3 November 2010, Steven Kay will deliver a lecture will deliver a lecture entitled Bangladesh War Crimes Tribunal – A Wolf in Sheep's Clothing? as part of the Supranational Criminal Law Lecture Series at the Asser Institute in The Hague.

Date: 03 November 2010
Time: 19:30
Organiser: T.M.C. Asser Instituut, CICC and Grotius Centre
Venue: T.M.C. Asser Instituut, R.J. Schimmelpenningcklaan 20-22, The Hague

- **The Influence of International Organizations on the European Union Legal Order**

This conference addresses the relationship between the European Union and other international organizations by looking at the increasing influence of norms enacted by international organizations on the shaping of European law.

Date: 05 November 2010
Time: 09:00
Organiser: Centre for the Law of EU External Relations (CLEER)
Venue: T.M.C. Asser Instituut, R.J. Schimmelpenningcklaan 20-22, The Hague