ADC ICTY TPIY

NEWSLETTER

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ICTY/MICT NEWS

Prosecutor v. Mladić (IT-09-92)

On 9 July, Defence Witness Luka Dragičević, Assistant Commander for Morale, Religious and Legal Affairs in the Sarajevo-Romanija Corps (SRK), resumed his testimony under the Prosecution's cross-examination. When asked about a his description of SRK activities in his statement, Dragičević claimed that the SRK activities were self-defence, which sometimes included offensive operations to gain certain positions for effective defence of the territory and people. Dragičević, as a morale officer, was in charge of preserving and building combat morale. The Prosecution presented a document of SRK command guidelines which referred to Muslims by using a derogatory term and Serbs as "genetically stronger, better, more handsome and cleverer". Dragičević upheld the substance of the document, attributing the wording to both life experience and as a way to build up combat morale. Dragičević stated that the instructions in the document were intended first and foremost for the officers working on the issues of morale and religious affairs, and that the language was acceptable even if the choice of words was not the best. He emphasised that the purpose of the document was to achieve combat success and the best possible results.

Regarding the witness's time at the Višegrad Brigade and Milan Lukić, Dragičević denied that Lukić was ever a part of his brigade. He stated that the certificate from Dragičević to Lukić produced by the Prosecution was a fake document and that the signature on the certificate does not belong to him. When asked if his brigade par-

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Also in this issue

ticipated in the Štrpci abduction, which has been attributed to Lukić and his men, Dragičević maintained that his brigade was not involved. The Prosecution quoted from an order regarding Operation Zvezda, which the Višegrad Tactical Group participated in while Dragičević was in command. Dragičević explained that the order, which referred to fortifying Serb positions in Sarajevo, actually meant specifically the Bosnia and Herzgovina (BiH) Army's 1st Corps. In response to a judicial inquiry regarding how the Serb army surrounded the BiH Army without surrounding civilians, Dragičević stated that the BH Army used people as shields and it was the BH Army's duty to distinguish themselves from the civilians.

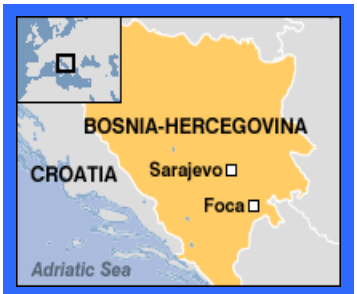
On Thursday, 10 July, Nenad Kecmanović, a former politician from Bosnia-Herzegovina and member of the BiH Presidency from April 1992, began his testimony regarding the political situation in BiH prior to the war, including the views of former BiH president Alija Izetbegović. Kecmanović testified that Izetbegović was a proponent of an Islamic majority, with non-Islamic groups receiving less rights, similar to the situation in BiH during the Ottoman empire. Kecmanović stated that these extremist views were prominent in Izetbegovic's book, *the Islamic Declaration*, which was republished in 1990 while he was in power and exacerbated support for these views. During cross-examination, Kecmanović stated that new information had caused him to change his mind regarding a report he wrote for the *Kvočka* trial which claimed there was terrible repression by the Serbian army and police in Prijedor and inhumane conditions in Omarska and Keraterm. Kecmanović stated that in his travels between his testimony in the Karadžić case in 2012 and now, he learned that the scale of crimes against non-Serbs was significantly smaller than he once believed and his beliefs at the time of his report were formed by what he believes to have been propaganda put out by the Bosnian leadership. Kecmanović further stated that in Saravejo, he saw numerous people who had been mistreated, but that Muslims in Sarajevo were not prominent among them. Kecmanović stated that there was more visible damage in Grbavica than in the old centre of Sarajevo. Kecmanović cross-examination continued on 12 July with the Prosecution reading from the witness's report in the *Kvočka* trial and asking about a "shocking statement" made by Karadžić, which said that Muslim people could possibly become extinct if it came to war, Kecmanović stated that it was meant to be cautionary. When asked about details of the Cutileiro Plan, an attempted peace plan, Kecmanović emphasised that the Muslim side withdrew from the plan and the plan failed. Kecmanović was further asked about changes in the ethnic makeup of the territories as a result of violence, war and genocide. Kecmanović stated that all official proposals of transforming BiH territorially without radical or forced changes to the ethnic structure were rejected by the Muslim side. Regarding the Vance-Owen Plan, Kecmanović recalled that it was overwhelmingly rejected after a speech by General Mladić, though there was contention as to whether the chorological development denoted causality.

Nenad Kecmanović

Kecmanović's testimony continued on 14 July with the re-examination. Kecmanović denied ever being issued any asylum when he moved to Belgrade during the war. He reemphasised Izetbegović's influence in BiH. Kecmanović stated that his party advocated the unity of BiH and Yugoslavia, and both Muslim and Serb people feared being in a minority position. He expanded on the reasons people were leaving one territory to go to another, and attributed it to fear of the conflict or the escalating situation as the primary reason for people leaving, not forcible removal. He stated that the term genocide was not applicable to the situation in Bosnia and Herzegovina because neither side intended to totally destroy the other people.

Colonel Milorad Šehovac, former Commander of the 2nd Sarajevo Brigade, testified next for the Defence. Like other witnesses before him, Šehovac insisted that his unit adhered to the Geneva Conventions, did not target civilians and engaged only in defensive operations. The witness testified that the Army of the Republika Srpska (VRS) did not shell the tunnel underneath the airport because the tunnel was too close to United Nations troops. Šehovac conceded that his unit fired on ostensibly civilian targets, like the Aleksa Šantić School, but only because it was used as a plant to produce shells making it acceptable under international law. The BiH Army, meanwhile, violated international law by not evacuating civilians from the

combat zone. On cross-examination, the Prosecution alleged that the witness committed murder earlier in the war, when he was Commander of the 1st Posavina Brigade in Brčko. Šehovac vehemently denied the allegation. The Prosecution then confronted the witness with evidence that the VRS did, in fact, shell the tunnel underneath the airport. Šehovac granted that it was possible that such a shelling occurred, causing the Prosecution to accuse him of being an unreliable witness.



Location of Foča

The next witness to testify for the Defence was Dragan Milanović, who was a platoon Commander for the VRS in Foča. According to the Prosecution, crimes committed by Serbs in Foča approached genocide. Milanović agreed that atrocities were committed, however, argued that they were not committed by those under control of the VRS. According to the witness, the Serbs retook Foča from the Muslims on 12 April 1992, and non-Serbs who remained were allowed to live as normal a life as was possible under the wartime conditions. Those who attacked and killed non-Serbs were out-of-control factions, who were not under the control of the VRS. Milanović blamed the Crisis Staff in Foča for allowing the atrocities to occur. The Prosecution did not contest this, as the Prosecution contends that the Crisis Staff was part of a criminal structure that implemented the leadership's policies. In response to the witness's claim that non-Serbs who remained were allowed to live a relatively normal life, the Prosecution read evidence purporting to show that Serbs removed and limited the Muslim population in Foča. Milanović denied any knowledge that such acts took place.

The Defence then introduced Milutin Vujičić, who also discussed alleged crimes in Foča. During the war, Vujičić was a guard at the Partizan Sports Hall, a reception centre where Muslim girls and women were allegedly raped systematically by the Serb population of Foča. The witness did not deny that any rape occurred, but said that a reception centre was set up for Muslim women to ensure their safety and Serb authorities protected Muslim houses. The Prosecution introduced evidence that it argued showed that Muslim men, women and children were evacuated from the facility and asked the witness why they would need to be evacuated if they were protected in the facility. Vujičić said he did not know anything about those prisoners. The witness further testified that religious buildings were not damaged by the VRS, but by paramilitaries and NATO air strikes, and Serb authorities actually made efforts to get Muslims to stay in Foča. In response, the Prosecution introduced evidence that 13 mosques were already destroyed before the NATO air strikes began, to which Vujičić responded that they were destroyed by paramilitaries and other groups unconnected to the military.

Zoran Nikolić, former Head of the Employment Office and member of the Territorial Defence, was the next witness to testify for the Defence, and continued discussing events that transpired in Foča. According to Nikolić, many Muslim citizens fled Foča with Muslim soldiers, but this was voluntary and there were no orders from Serb command to expel citizens. Nikolić also explained that after Serbs took control of Foča, other units from Serbia and Montenegro entered the city that the military had no control over. On cross-examination, the Prosecution questioned the witness about a previous case where a protected witness claimed she had been raped twice by a soldier named Zoran Nikolić. The witness, however, denied that it was him and said that there were two others with his name who were in Foča at the time, and posited either of them could be the guilty party. After cross-examination, Judge Orie questioned Nikolić about the Correctional and Penal Facility in Foča, one of the facilities mentioned in the indictment against Ratko Mladic. Nikolić recounted a story that he once hitched a ride in a vehicle that was transporting prisoners to work in the Miljevina mine, which the witness was unpleasantly surprised by.

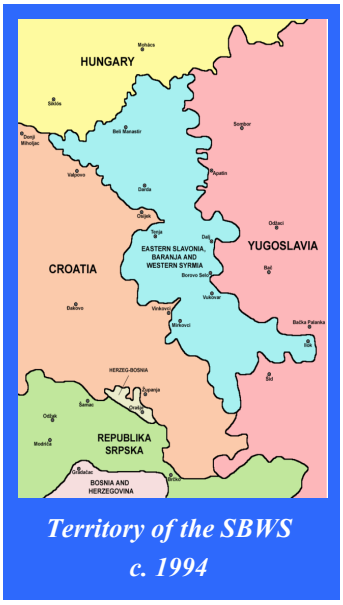
Continuing the testimony relating to the alleged crimes committed in Foča was Veselinko Simović, who was in the Foča Intervention Platoon during the war. Simović echoed the testimony of earlier witnesses saying that the conflict in Foča erupted spontaneously and paramilitary organisations were responsible for crimes committed, rather than the military. On cross-examination, the Prosecution showed the witness evidence of crimes committed by the military in Foča, including convictions of soldiers for raping local

women. Simović maintained that if such crimes were committed they were done so without the knowledge of superior officers and such soldiers were a disgrace to the military. Concerning allegations of illegal detention, the Prosecution tendered evidence that many of the prisoners were elderly. The witness denied having knowledge of such crimes, but said that elderly men were used as soldiers, implying that it would be proper to detain them. Finally, Simović, like many Defence witnesses before him, emphatically argued that non-Serbs were not deliberately expelled from the region, but were allowed to leave voluntarily if they wished to do so.

Prosecutor v. Hadžić (IT-04-75)

On 9 July, Goran Hadžić continued his testimony, focusing on the roles played by Radovan "Badža" Stojičić and Željko "Arkan" Ražnjatović in Slavonia following the fall of Dalj in August 1991. According to Hadžić, Stojičić came to Dalj in early August where he introduced himself as a high-ranking official of the Serbian Ministry of Internal Affairs (MUP) and declared he had been sent to Slavonia to take over the Territorial Defence. Despite this, Hadžić denied Stojičić ever established ties with the Government of Slavonia, Baranja and Western Srem (SBWS) and claimed that, while Stojičić did occasionally attend government meetings, the government remained entirely independent from him. As for Arkan, Hadžić refuted the suggestion that there was ever a relationship between the two. Hadžić never took the initiative to meet Arkan, he saw him only when Arkan wanted. Arkan insisted and wanted to provide security to Hadžić, but Hadžić had repeatedly refused. Hadžić believes that Arkan insisted on providing security to ensure that he exercised control over Hadžić. As for Arkan's role within the Government of SBWS, Hadžić categorically denied that he took any part in the day-to-day business of the government whatsoever; to the contrary, Arkan "was simply not interested". The SBWS government also did not finance Arkan's centre in Erdut.

On 10 July, Hadžić spoke about the formation of the SBWS on the 25 September 1991 and his role as Prime Minister. In this capacity, Hadžić was responsible for reconciling the desire for equal territorial representation among the three regions with the need for finding professional, qualified candidates to serve as ministers in the nascent government. Compounding this challenge was Hadžić's accountability to the other elected ministers of the assembly. Despite serving as the SBWS' Prime Minister, Hadžić was unable to remove a minister from power without the assembly's approval and lacked both the technical and financial capabilities to exert any real influence on developments in the SBWS. Furthermore, Hadžić claimed the assembly lacked control over any armed forces or police units, making it impossible for the government to either enforce or implement measures passed by it. Goran Hadžić also testified about his relationship with Slobodan Milošević. According to Hadžić, while direct contact with Milošević was sporadic, he did accompany Milan Babić, President of the municipality of Knin, to Belgrade to speak with Milošević about developments in the ongoing peace talks held in Paris with Henry Wijnaendts. Hadžić also briefly touched upon his relationship with other members of the Joint Criminal Enterprise and noted *inter alia* that he never met with Jovica Stanišić, and possibly never met Radmilo Bogdanović; and was not "on very good terms" with Mihalj Kerteš.



Territory of the SBWS c. 1994

On 14 July, Hadžić addressed some of the specific charges leveled at him and denied any prior knowledge or involvement in any of the incidents named in the indictment. With regards to Ilok, Hadžić maintains it would have been impossible for the political leadership of the SBWS to have organised the Territorial Defence units which drove Croats from Ilok in October of 1991. Personally, Hadžić claims to have not even been present in Ilok during

the campaign nor privy to any information regarding the territory. He claims the military administration had "sealed off" Ilok and maintained a strict control over the campaign, leaving him and others dependent on the local media for information. Likewise, Hadžić also maintained he was not present in Lovas in October 1991. In relations to Vukovar, Hadžić maintains that the SBWS government started establishing the civilian authority, but it was not established, contrary to Theunen's report, on that day avowing that military rule continued for another couple of months following 20 November 1991. 20 November merely marked the day that a meeting of members of the SBWS government was held at Velepromet. Hadžić claims the government was unaware of the existence of any camps in the surrounding area of Vukovar (i.e. Begejci, Nis, Ovčara, Sremska Mitrovica, Stajičevo). In terms of speeches that he made about Vukovar, he had merely adopted a "Machiavellian approach" in the interview to try and diffuse tension between the government and a Territorial Defence eager to dismantle the government and establish an independent civilian authority over which they could exert more influence.

Following the adoption of the Vance-Owen Plan in January of 1992, Goran Hadžić gave an interview to the media in which he directly defied Slobodan Milošević and accused him of having "cheated" the inhabitants of the SBWS. According to Hadžić in his testimony of 15 July, he felt the peace plan, as finalised, was "not in accordance" with the guarantees provided by Serbia and had been signed without taking his opinion into account. Furthermore, despite assertions to the contrary, the military was given complete control over SBWS and set about securing their rule at the expense of the civilian authorities. According to Hadžić, following the fall of Vukovar, the Territorial Defence was placed in power and given responsibility for protecting the safety of local inhabitants and their property. "Everything was under military rule" and the Government of the SBWS maintained no jurisdiction whatsoever over either the Territorial Defence Staff of Vukovar or their actions. In fact, Hadžić maintained that, even as the Prime Minister of the SBWS, he was not consulted on actions taken by the Territorial Defence to provide protection for local inhabitants. Following the amalgamation of SBWS into a single entity, Hadžić claimed he was talked into accepting the presidency of the Republic of Serbian Krajina (RSK) on the assumption that it was to be a "temporary solution" which was required at that time. Hadžić, was the "only acceptable solution" according to Milan Paspalj, as being "able to reconcile all the different parties". His role with the Supreme Defence Council was merely to serve as "first among equals" as everybody was there on equal footing, and he was just the person chairing the body.

Goran Hadžić

On the final two days of his examination-in-chief, Goran Hadžić testified on the Prosecution of crimes within the SBWS. In his capacity as executive, Goran Hadžić refrained from interfering with the work of the judiciary nor did he involve himself in prosecutions in general, but he was in a place where he could observe daily proceedings, and saw that there were courts established in the territory in late 1991. According to Hadžić, "in every case where perpetrators were identified, they were prosecuted", including cases where Serbs were accused of having committed crimes against Croats and other non-Serbs. In Hadžić's words, these attacks were undermining his government and "went completely against all our political interests". With regards to the mass grave at Ovčara, Goran Hadžić claimed he was not told about its existence until November of 1993, at which time he lent his immediate support to the exhumation of the remains of the victims. Hadžić expressed his concern for the wives of the victims who were unable to obtain benefits or exercise any of their rights before receiving death certificates. He claims he took this "very seriously" and worked to the best of his ability to settle such matters. This view was not shared by everyone in his government and, following Hadžić's defeat in his bid to be re-elected to the presidency of the Republic of Serbian Krajina, the plan to exhume the bodies of the victims at Ovčara was put on hold until 1996. Towards the end of Hadžić's testimony, he noted that he had no control over the White Eagles, Šešelj's Chetniks.

Prosecutor v. Šešelj (IT-03-67)

On 10 July, Trial Chamber III issued an *Order terminating the Process for Provisional Release of the Accused, proprio motu*. The Order was issued subsequent to the internal memorandum filed by the *Pro Se* Liaison Officer upon request by Vojislav Šešelj, in which the Accused had informed the Chamber that he did not intend to formally express his commitment to comply with the conditions of his provisional release to the Republic of Serbia. The Chamber considered that the Serbian government had stated that although it considered itself capable of guaranteeing that the conditions for provisional release laid down by the Chamber would be respected, its cooperation was subject to a formal commitment by Šešelj to respect these conditions, and that Šešelj had refused to make such a commitment. Accordingly, the Trial Chamber decided to terminate the process for provisional release of Šešelj, which had been initiated after Judge Niang had informed the Chamber that he would need more time to familiarise himself with the record of the case, and that the pronunciation of the Judgement against Šešelj would thus be delayed for an unforeseeable period of time. Šešelj has been in ICTY detention since 24 February 2003, and has served a total of four years and nine months of imprisonment for convictions on three counts of contempt of the Tribunal.

Prosecutor v. Karadžić (IT-95-5/18)/(MICT-13-55)

Request for the ICTY Trial Chamber to Investigate whether Contempt has been Committed by Members of the Office of the Prosecutor

On 19 May, Karadžić requested that the Mechanism for International Criminal Tribunals (MICT) appoint a Mechanism Single Judge to consider whether members from the Office of the Prosecution have wilfully interfered in the administration of justice at the ICTY. The Single Judge can only be appointed if the Karadžić Trial Chamber finds that there is "reason to believe" ICTY members interfered with the administration of justice. Judge Vagn Joensen was assigned as the Mechanism Single Judge to rule on Karadžić's request. Judge Joensen ultimately ruled that in the event that the Karadžić Trial Chamber declines the invitation to investigate the alleged interference with the administration of justice, he will have the competence to make such a determination pursuant to Rule 90 (C) of the Mechanism Rules, which essentially states that a person or party who is suspected of being in contempt may be referred to the President of the MICT who will then designate a Single Judge to formally begin investigations on the allegation.

Decision on the Accused's Ninth Motion for Order Pursuant to Rule 70

On 14 July, the United States sent Radovan Karadžić a letter in response to his request for a "Copy of the Cable from Brigadier Jones referred to in the memorandum of the deputies committee meeting of 22 February 1993", in which the United States (US) agreed to provide the Accused with a declassified and redacted copy of the document. The Chamber must decide on Rule 70 which permits the Defence to access confidential documents from a third party source, in this case the United States. The Chamber has ruled "that the US has consented to provide the document responsive to the Accused's request, so long as there is an order from the Chamber that applies Rule 70 to the document and the information contained therein".

Motion to Disqualify Judges Kwon, Morrison, Baird and Lattanzi

On 17 July, Radovan Karadžić made a motion pursuant to Article 13 *bis* of the ICTY Statute disqualifying Judges O-Gon Kwon, Howard Morrison, Melville Baird and Flavia Lattanzi from continuing to serve on his case, contending that their terms of office and appointment to his case have expired. The IC-

ICTY Statute

Article 13 *bis* (3)

Election of Permanent Judges

The Permanent Judges elected in accordance with this article shall be elected for a term of four years. The terms and conditions of service shall be those of the Judges of the International Court of Justice. They shall be eligible for re-election.

TY Statute states that Judges of the ICTY, permanent and *ad litem*, shall be elected to four year terms, after which they need to be re-elected by the United Nations General Assembly upon expiration of their term. These judges were last re-elected by the General Assembly on 16 July 2010, meaning as of 17 July their lawful terms of office have expired.

In a resolution adopted in 2011 which has since been passed annually, the United Nations Security Council has extended the terms of office for each of the Judges. The most recent resolution purported to extend the terms of office for each of the Judges until 31 December 2014. The Security Council indicated that it was acting pursuant to Chapter VII of the United Nations Charter. However, Karadžić contends that this resolution contradicts the United Nations Charter and ICTY Statute, meaning the Security Council ultimately lacks the authority to unilaterally adopt this resolution.

Election of Judges by the General Assembly is an important component of the legitimacy of the ICTY. This was recognised by the ICTY in a press release 15 March 2001 which stated that the election of Judges by the General Assembly was "a transparent and democratic process which highlights the international legitimacy of the Tribunal". Karadžić is resolute in his determination that the ICTY and United Nations follow its own Statute and Charter. He contends that, if he cannot count on the Tribunal to follow its own Statute, then he has no protection from arbitrariness and capriciousness in the judgement of his case.

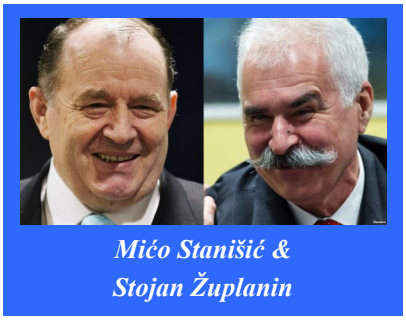
Prosecutor v. Popović *et al.* (IT-05-88)

On 22 July, a Status Conference was held in the case of Popović *et al.* Present at the proceeding were all of the Accused except for Drago Nikolić, who was unable to make it due to his health. The Status Conference was without issue, with none of the Accused raising any issues, either with their detention facilities or the proceedings in general. The Trial Judgement in this case was issued in June 2010, and the Appeals Hearing took place in December 2013.

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

A Status Conference was held in the case of *Prosecutor v. Stanišić and Župljanin* by the Pre-Appeal Judge, Judge Agius, on 24 July. Judge Agius reviewed recent orders and decisions issued by the Appeals Chamber in the case, primarily related to modifications of the grounds of appeal and, as a result, to the briefing schedule. He also indicated that there are two outstanding motions that need to be decided by the Appeals Chamber – one from April submitted by Stanišić regarding reconsideration of a prior decision on Stanišić's motion for a declaration of a mistrial and Župljanin's motion to vacate the Judgement, and a confidential motion from June submitted by the Prosecution. Judge Agius indicated that a decision on the former motion would be delivered very soon and on the latter in due course.

No other issues were raised by the parties, save for Counsel for Stanišić indicating that they would file a Corrigendum to their Notice of Appeal to correct a reference to an incorrect version of a document. Judge Agius closed the session by addressing the Appeals Hearing, which he said would not be held before next year. The drafting team in Chambers for this case is being reorganised; because the drafting team works prior to the hearing and judgement on an outline, and because of the recent amendments to the grounds of appeal in this case, it will not be possible to hold the hearing this year.



Mićo Stanišić & Stojan Župlanin

LOOKING BACK...

International Criminal Court

Five years ago…

On 21 July 2009, the Czech Republic became the 110th state and the final EU member state to ratify the Rome Statute of the International Criminal Court. The Czech Republic had initially signed the Rome Statute in 1999, however internal political and legal struggles kept the state from ratifying it until 2009, five years after its acceptance to the European Union. The internal struggles were caused mainly by the President of the Czech Republic's initial hesitation to sign the treaty, and a debate in the governement over whether the President had an intrinsic duty to ratify international treaties such as the Rome Statute. Subsequently, the debate among Czech politicians focused on whether such a duty to ratify was consistent with the Czech constitution. Currently there are 139 Signatories of the Rome Statute and 118 Ratifications.

Special Court for Sierra Leone

Ten years ago…

On 5 July 2004, the trial of Issa Hassan Sesay, Morris Kallon and Augustine Gbao was opened by Trial Chamber I of the Special Court for Sierra Leone. The three Accused were charged with nine counts of war crimes and nine counts of crimes against humanity as alleged former commanders of the Revolutionary Units Front ("RUF"), a rebel group which fought against the government of Sierra Leone during the civil war between 1991 and 2002. The hearing on 5 July contained the opening statements by the Prosecution and by Raymond Brown, Counsel for Kallon. While Sesay chose to make his opening statement upon the opening of the Defence case, Gbao intended to speak at the opening of the trial; however, he was prevented from doing so by the Judges who found that his statements did not conform to Rule 84 of the Special Court for Sierra Leone Rules of Procedure and Evidence, and who tried to relitigate matters concerning the Court's jurisdiction which had already been decided in the preliminary motions.

SCSL Rules of Procedure and Evidence

Rule 84

Opening Statements

At the opening of his case, each party may make an opening statement confined to the evidence he intends to present in support of his case. The Trial Chamber may limit the length of those statements in the interests of justice.

The Prosecution's case continued until 2 August 2006. Subsequently, the Defence teams presented their evidence until 24 June 2008. On 25 February 2009, the Trial Chamber found Sesay and Kallon guilty on 16 of the 18 counts contained in their indictment; Gbao was found guilty on 14 counts. In a separate judgement on the sentences, Sesay was sentenced to 52 years in prison, Kallon to 40 years and Gbao to 25 years. Though one of the convictions for Gbao was later overturned by the Appeals Chamber, all sentences were reaffirmed on appeal. The Judgement in the RUF case marked the first-ever convictions of individuals for forced marriage as a crime against humanity, and attacks against UN peacekeepers as a war crime.

International Criminal Tribunal for the Former Yugoslavia

Fifteen years ago…

On 15 July 1999, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia rendered its Judgement on the appeal of Duško Tadić and the Prosecution's cross-appeal against the Trial Judgement of 7 May 1997. The Chamber reaffirmed the convictions of Tadić on eleven counts of persecution and beatings, which had been charged as cruel treatment as a war crime and inhumane acts as crimes against humanity; however, it reversed the acquittals of the Accused with respect

to grave breaches of the Geneva Conventions and murder as a war crime and a crime against humanity.

Notably, the Appeals Chamber concluded that the Trial Chamber had erred in finding that Article 2 of the ICTY Statute, dealing with grave breaches of the Geneva Conventions, was inapplicable because the victims were not protected persons under the Conventions, i.e. they were not in the hands of a party to the conflict or of an occupying power of which they were not nationals. The underlying question was whether, after the Yugoslav People's Army (JNA) withdrew from the Republic of Bosnia and Herzegovina on 19 May 1992, the members of the the Army of the Republika Srpska VRS could be regarded as *de facto* organs of the Federal Republic of Yugoslavia (FRY) or the Yugoslav Armed Forces (VJ). The Trial Chamber had concluded that this was not the case, using the "effective control" standard, which had been established by the International Court of Justice in its *Case concerning Military and Paramilitary Activities in and against Nicaragua* in 1986. It had then found that the evidence of the degree of effective control of the VJ over the VRS was insufficient, and that the VRS could not be considered *de facto* agents of the FRY. However, the Appeals Chamber decided otherwise, finding that the applicable standard was not one of "effective control", but rather one of "overall control" of the FRY/VJ over the VRS. Since it found that the armed forces of the Repubika Srpska were indeed acting under the overall control of, and on behalf of, the FRY, it also concluded that the victims were protected persons who found themselves in the hands of the armed forces of a State of which they were not nationals; consequently, Tadić was found guilty of six counts of grave breaches of the Geneva Conventions.

Secondly, the Appeals Chamber also overturned the Trial Chamber's acquittal for three counts of murder, namely as a grave breach of the Geneva Conventions, as a violation of the laws and customs of war and as a crime against humanity, for Tadić's alleged involvement in the killing of five men in the village of Jaskići. Even though the Trial Chamber had been satisfied beyond a reasonable doubt that Tadić had been a member of a group of armed men that entered and searched Jaskići and seised and beat villagers, it could not conclude from the evidence before it that he had taken any part in the killing of the five men. In contrast, the Appeals Chamber convicted Tadić for the killings, using the doctrine of Joint Criminal Enterprise (JCE) as a mode of direct participation in a crime. Tadić was the first Accused to be held criminally liable under this doctrine, whose roots the Chamber found in post-World War II jurisprudence and customary international law. Up to the present day the doctrine remains controversial; notably, the ECCC has ruled that the extended form of JCE was not part of customary international law during its period of jurisdiction in the late 1970s, and the ICC has rejected the doctrine altogether. In contrast, at other tribunals, the concept of JCE is still used very frequently, particularly in order to establish the criminal responsibility of high-level military commanders and politicians who have never been physically involved in the commission of a crime.

NEWS FROM THE REGION

Bosnia and Herzegovina

Four Bosnian Croats Indicted for War Crimes

An indictment against Marijan Brnjić, Martin Barukčić, Pavo Glavać and Ilija Glavać was issued by the State Attorney's Office of Bosnia and Herzegovina (BiH). They were members of the Croatian Defence Council (HVO), and the basis of the indictment is war crimes against Serb civilians that were committed in the Posavina region between 1992 and 1995. Each of the Accused holds dual citizenship in Croatia and BiH.

The Accused were all members of the 102 HVO Brigade that was stationed in Odžak, which is in the Northern part of BiH. According to the indictment the four Accused sexually assaulted Serb women in the area of Odžak and committed multiple rapes. The charges include "violations of the Geneva Convention Relative to Protection of Civilians in Time of War and war crimes against civilians".

Croatia

Zagreb Issues Warrant for the Extradition of Milan Martić from his Imprisonment in Estonia

A warrant for the extradition of Milan Martić was issued on 14 July by a court in Zagreb. The court issued the warrant so that Martić can be tried in Croatia on charges of shelling the towns Karlovac and Jastebarsko near Zagreb in May 1995.

Milan Martić, the former President of the self-proclaimed Autonomous Region of Krajina, was convicted of crimes against non-Serbs in Croatia by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 2007, and he is currently serving out a 35-year term in Estonia. He was also convicted of being a member of a Joint Criminal Enterprises (JCE) together with Slobodan Milošević, as well as other notable Serbs. Martić was also found guilty of ordering the May 1995 bombing of Zagreb that took the lives of seven and wounded over 200. On 8 October the Appeal Chamber of the ICTY affirmed the 35 year sentence that was decided by Trial Chamber I the previous year.

Milan Martić

In the original indictment for the shelling, Martić was indicted together with Serb army leader Milan Celeketić. However, the Croatian authorities restarted the proceedings in 2010 after the ICTY did not include the shelling of the towns in their indictment. Milan Martić has dismissed the accusations and "finds them to be an ordinary provocation".

At the moment it still unknown whether Estonia or the ICTY will have to decide on the extradition. The trial against both Accused will be held even if they are absent.

Kosovo

Kosovo Justice System Moving Towards Self-Sufficient Rule of Law

The European Union Rule-of-Law Mission (EULEX) in Kosovo will have to make personnel and budgetary cuts. The Mission needs to cut 30 per cent from their staff and 20 per cent of their annual budget. These cuts will be made in regard to an EULEX mandate that will take effect in October and requires that EULEX transfers all duties to local authorities over the next two years. EULEX will have to cut 600 positions from 2070 current ones. 400 of those postitions are international and 200 are local.

EULEX has been working in Kosovo since 2008 and started a day before the declaration of independence on 17 February of that year. During its mandate, the Mission has helped the shaping of Kosovo's judicial and legal implementation. The main task of the Mission was handling cases that were considered to be "too sensitive for the local authorities". EULEX will continue to work on their current cases, but the Prosecution will not open any new cases. There will be fewer EULEX judges than local judges and will advise them in their performance. Even though the Mission notes that new cases may be opened by EULEX at the request of the Mission, and that the local authorities may "request a EULEX majority on court benches in extraordinary circumstances". This transfer of duties is deemed to be the first step of executive powers transfer from EULEX to local authorities for which the deadline is set to be 2016.

The EULEX has some supporters in Kosovo, the Mission is generally regarded as an obstacle to the sovereignty of the new state, but there are very few hints that the state institutions are ready to function independently. Shpend Kursani, an analyst with through knowledge on the Mission, stated that in his opinion "there is no good time ever for EULEX to leave, but every second should be used to make local-rule-of-law institutions

more independent". He also noted that the Mission has not contributed much to the improvement the local authorities' work.

The Chief Prosecutor of Kosovo, Sevdije Morina, stated that with regard to the transfer of power, she has received no information about investigations conducted by EULEX. She also noted that they are committed to taking on harder cases "including war crimes".

International judges expressed their opinion that the Kosovo authorities are ready to take over from EULEX. This was made after the plans for downsizing were becoming clearer. A suggestion that transition should be slowed down was sent in written form to the Head of EULEX, Mats Mattson.

Even though the Mission is cutting their staff positions, it continues the implementation of the April 2013 agreement stating that Serb institutions from Northern Kosovo should be incorporated into Priština's institutions. This also means that judges from Serb nationality should also be brought to the Kosovo courts.

NEWS FROM OTHER INTERNATIONAL COURTS

International Criminal Court

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

THE PROSECUTOR V. BOSCO NTAGANDA

On 18 July, the Presidency of the International Criminal Court (ICC) constituted Trial Chamber VI, which will take charge of the case *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06. Previously, on 9 June, Pre-Trial Chamber II had unanimously confirmed the charges against Ntaganda and assigned him to a Trial Chamber. Furthermore, on 4 July, Pre-Trial Chamber II rejected a request of the Defence to appeal the confirmation of charges in this case. Pursuant to Article 61(11) of the Rome Statute, the Presidency constituted a Trial Chamber once the charges were confirmed; the Judges of the new Trial Chamber will be Kuniko Ozaki of Japan, Robert Fremr of the Czech Republic and Geoffrey A. Henderson of Trinidad and Tobago.

Bosco Ntaganda, former alleged Deputy Chief of the General Staff of the *Forces Patriotiques pour la liberation du Congo*, is accused of 13 counts of war crimes, including murder, attacking civilians, rape, sexual slavery, pillaging, displacement of civilians, enlistment of child soldiers, destroying property and attacking protected objects. He is also accused of five counts of crimes against humanity, including murder, rape, sexual slavery, persecution, forcible transfer of population, all allegedly committed in Ituri in the Democratic Republic of Congo.

ICC Statute

Article 61(11)

Confirmation of the Charges Before Trial

Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

Extraordinary Chambers in the Courts of Cambodia

By Anna Butler, Legal Intern, Case 004 Defence Team .

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

On 5 June, the Trial Chamber announced that the Judgement in Case 002/01 against Khieu Samphan and Nuon Chea, would be delivered on 7 August. It scheduled the initial hearing in the second phase of Case 002 for 30 July. The Khieu Samphan Defence Team filed their list of documents to be used in the Trial. They filed a motion under Internal Rule 87(4) to seek the inclusion of a new expert in their expert/witness list, as well as a motion, outlining the legal issues, which they deem to require examination, during the initial hearing. The Nuon Chea Defence Team remains hard at work, preparing for the impending trial in Case 002/2.

The Case 003 Defence has continued to file confidential submissions to protect its client's rights and interests. Since the case file remains inaccessible, the Case 003 Defence Team relies on publicly available information.

In Case 004, all Defence Teams are furthering their attempts to gain access to their respective case files. One Defence Team has filed a motion requesting the inclusion of their filings in the case file; at the moment the Office of the Co-Investigating Judges (OCIJ) has refused to do so. The same team has filed a motion to the OCIJ, inquiring as to the outcome of the case, in the event of a split decision between the National and International Co-Investigating Judges in which one judge indicts the named suspect and the other dismisses the case.

Similarly, in Case 004 team is filing motions to seek clarification on various issues regarding the named suspect's rights. All Case 004 teams continue to ensure their clients' rights as named suspects are respected. Efforts are concentrated on preparing their clients' defence through the use of the limited information received and, publicly available sources.

Special Tribunal for Lebanon

STL Public Information and Communications Section.

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

Testimonies of Two Prosecution Expert Witnesses in the Ayyash *et al.* Case

In the week commencing on 14 July, two Prosecution witnesses in the Ayyash *et al.* case testified before the STL. Bart Hoogeboom, a forensic scientist specialised in photogrammetry (i.e. image analysis) testified from the courtroom on 15 July. Photogrammetry involves measurements taken on the basis of photographs and video images. Hoogeboom's task was to determine the measurements of the crater caused by the 14 February 2005 attack based on photographs taken shortly after the explosion.

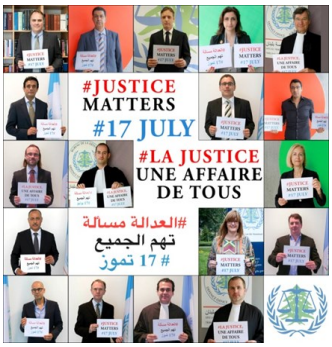
On 16 July Prosecution Witness Gerhard Geyer testified. Geyer, a mechanical scientist, worked with Mitsubishi for 17 years and has extensive knowledge about the brand's lorries. The witness' involvement relies upon a request from the United Nations International Independent Investigation Commission (UNIIIC) sent in 2005 via the Federal Motor Transport Authority, for Mitsubishi Deutschland.

Contempt Cases

A hearing for the issuance of a decision on jurisdiction in the contempt case against New TV S.A.L and Karma Mohamed Tahsin Al Khayat (case no. STL-14-05) has been scheduled for Thursday 24 July. The Defence motion challenging such jurisdiction was filed on 16 June. The Contempt Judge Nicola Lettieri will issue a decision on the jurisdiction of the Tribunal to hear cases of contempt with respect to

legal person. The Judge will read a summary of the decision and provide the written full version of the ruling during an open hearing starting at 3:00 PM (CET).

International Criminal Justice Day



The Special Tribunal of Lebanon participated in the initiatives taken to celebrate International Criminal Justice Day in the days leading up to and on 17 July. The day marks the adoption of the Rome Statute, the treaty that established the International Criminal Court. The ICC's project was a celebration of the Justice Day on 17 July. The campaign's aim was to raise awareness over the importance of Justice inside International jurisdictions and all over the world. Participating in the social media campaign, many officials from the STL had their picture taken while holding up signs saying #JusticeMatters and #17July in the three official languages of the Tribunal: Arabic, English and French.

DEFENCE ROSTRUM

Netherlands Held Liable for 300 Srebrenica Massacre Deaths

By Bas Volkers

The District Court of The Hague ruled on 16 July 2014 that the Netherlands is liable for the fate of about 300 men that were killed during the July 1995 massacre near Srebrenica. The men had fled to the United Nations (UN) compound which was under the control of Dutch UN peacekeeping forces (Dutchbat). The tort lawsuit was filed by the Mothers of Srebrenica, a group representing 6.000 women who lost family members during the Srebrenica genocide.

On 11 July 1995 about 20.000 to 25.000 civilians had fled the Bosnian Serb advance on Srebrenica and relocated to the UN compound at Potočari. Approximately 5.000 of them, including 300 Bosnian men, were let inside the compound, while the rest were spread around the neighbouring area. The civilians were evacuated on 12 and 13 July, after the Bosnian Serbs had separated the men from the women and children. Following this, about 8.000 men and boys, including the 300 from the compound, were killed over a period of several days.

Relatives of the Victims of Srebenica and Members of the "Mothers of Srebrenica"

In 2008 the District Court had already declined to hear a request from the Mothers of Srebrenica to prosecute the United Nations for the Srebrenica Massacre, stating that UN immunity from prosecution was absolute. This decision was later confirmed by the Supreme Court of the Netherlands and the European Court of Human Rights (ECHR). The Courts did leave the possibility open for the Netherlands to be held responsible. In a 2013 case, *the Netherlands v. Nuhanović* and *the Netherlands v. Mustafić*, the Supreme Court held that the Dutch government shared the responsibility for the deaths of three Muslim men who were murdered shortly after being forced to leave the UN designated safe area. The Court found that even though the Netherlands had placed the troops at the disposal of the UN peace mission, with command and control transferred to the UN, disciplinary and criminal matters remained under control of the seconding state. Any wrongful conduct of Dutchbat was thus attributable to both the UN and the Dutch state.

The Judges of the District Court based their decision on the findings of the Supreme Court. They determined that the government was closely involved in the decision-making process concerning Dutchbat. After the fall of Srebrenica, the Dutch government was in close contact with UN leadership. It was jointly decided that Dutchbat should focus on its humanitarian task, while preparing for the battalion's extraction. Pursuant to Article 8 of the Draft Articles on State Responsibility, the Dutch government exercised effective control over Dutchbat. Referring to the ECHR case *Al Skeini v. UK*, it was then concluded that Dutchbat did not have effective control over the whole Srebrenica safe area, but did have physical power and control over the compound and the civilians on it.

The Court also looked at any possible wrongful acts of the peacekeepers. Various Dutch peacekeepers had witnessed rapes, murders, maltreatment of civilians and the separation of the men from the women and children. From this the Court concluded that: "Dutchbat, under these circumstances [...] should have been aware of a serious risk of genocide of the men that were carried off the mini safe area". It therefore should not have sent the Muslim men away from the compound.

The Judgement reaffirmed the responsibility of nations seconding troops to UN peacekeeping missions. The lawyers representing the Mothers of Srebrenica have stated that they were happy with the outcome of the case, but will appeal the Court's decision because it did not hold the state responsible for the other men that sought refuge near the compound.

Many former Dutchbat personnel have found the Judgement difficult to accept. Evert Oostdam, Commander of a Dutchbat observation post said, "I stood there with a rifle looking at the cannon of a tank. Explain to me what I could have done as an individual". In 2013, the Dutch Public Prosecutor decided that the Commander of Dutchbat, Colonel Thom Karremans could not be held criminally responsible for the massacre and would not be prosecuted.

The Dutch government has never apologised for what happened near Srebrenica. In 2002, the Dutch Prime Minister Wim Kok resigned together with his entire cabinet after the official report on the Srebrenica Massacre was published. Kok felt "politically responsible", but also "emphatically would not take blame for the gruesome murder of thousands of Bosnian Muslims".

Palestine: Peace, Justice & Accountability

By Garrett Mulrain

On 3 July, the Hague Institute for Global Justice hosted a conference that proved as interesting as it was topical. Entitled, "Palestine: Peace, Justice and Accountability", the event hosted three speakers who brought different viewpoints as to the current outlook of the Israeli-Palestinian peace process. With escalating tension in those territories, as well as increasing regional threats, each speaker was able to focus on a variety of aspects, creating an engaging discussion for the group.

The first speaker was His Excellency Dr. Nabil Abuznaid, Ambassador of Palestine to the Kingdom of the Netherlands. He opened with remarks on something the entire crowd was all-too familiar with; continuously wasted efforts of peaceful solutions that lead one to believe that the conflict has reached a deadlock. Recent peace-talks, mediated by United States Secretary of State John Kerry have proved ineffectual at best. According to Abuznaid, upon seeing the situation as futile, John Kerry "left the scene without saying much". This recent failure is reminiscent of another that happened in 2000, when then-US President Bill Clinton hosted the Camp David Summit between Israeli Prime Minister Ehud Barak and Palestinian Authority leader Yasser Arafat. Each of these events ended without an agreement, prompting Abuznaid to question, "do the Americans have [the] keys to conflict?"

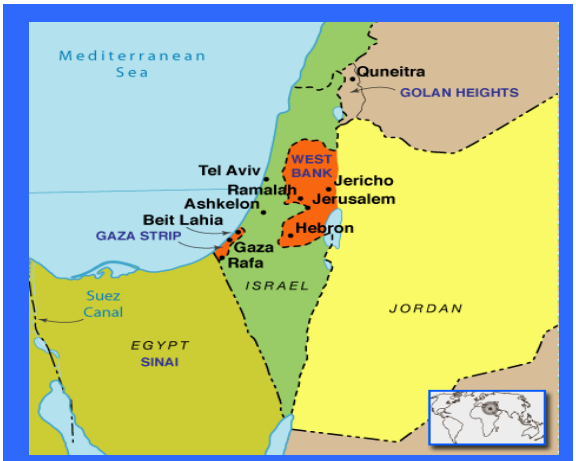
At the time of this writing the world was focused on the kidnapping and murders of three Israelis in mid-June and one Palestinian at the end of the month. These events have now escalated to the point of rocket strikes by both parties into the territory of the other, and as of 25 July over 700 Palestinians and over 30 Israelis are dead from the conflict which has worsened significantly in the twenty days since the conference took place. The Ambassador claims that these events are a reaction to the failed peace negotiations,

and would not have happened if each side had been offered a common dialogue, instead of the United States talking to each government separately. Citing the crux of the negotiations, territory and resources were evidently to be divided with (roughly) 78% going to Israel, leaving 22% to Palestine. Besides this proposal being heatedly contested (by both sides), proposals were brought forward of Israeli-State recognition by the other Arab Countries. Furthermore, Palestine had talked of becoming a demilitarised state if Israeli Prime Minister Benjamin Netanyahu agreed to recognise and account for the millions of Palestinian Refugees spread through the world. Despite each side not getting what they wanted from peace negotiations, Abuznaid remained hopeful for the future, "conflicts are created by humans, sustained by humans and should end by humans".

The next speaker was Nada Kiswanson, an European Union (EU) Advocacy Officer/Legal Researcher at the Non-Government Organisation (NGO) Al Haq. After remarking on the human rights situation of Palestinian territories, such as the demolition of homes, the limits on drinking water and the rights of refugees, she brought up an extremely relevant legal case. About 10 years ago, on 9 July 2004, the International Court of Justice delivered its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, stating that "the construction of the wall, and its associated regime are contrary to international law". Nada Kiswanson notes that this case provided the first legal reaffirmation of the Palestinian people's right to self-determination. Furthermore, the case highlighted ongoing discriminatory practice and the contested annexation of land.

Kiswanson then brought up the largely-unknown economic side of Palestinian Occupation, stating that "business interests are to blame for exploitation" of Occupied Territory. The Dutch NGO platform United Civilians for Peace, has cited 35 separate Dutch companies that have vested business interests in continued occupation, with the majority of profits going to Israel. A German company, HeidelbergCement, has also been discredited for alleged illegal action, with quarry activity in the occupied West Bank. According to Kiswanson, the "right to self-determination is the right to freely determine status", and this would include territorial and business-interests alike.

The last speaker was Ata Hindi, a Communications



Israel and Palestine

Officer Human Rights/International Humanitarian Law Secretariat and Researcher at the Institute of Law-Birzeit University. Hindi has a unique if not unorthodox solution to Israeli-Palestinian Peace. He believes, instead of a one-state or two-state solution, which each require mediation by both parties, that the Palestinian people should focus on securing their own legitimacy in the global community. After roughly 50 years of occupation, Hindi proposes that talks for Palestinian prisoners and security talks should continue, yet everything else regarding state recognition, national legislation/institutions, and even territory should be a Palestinian initiative.

The quest for statehood in international law is somewhat settled. Aside from the massive political concerns, most scholars cite the Montevideo Convention (1933) as providing a basis for declaratory theories of statehood. The Palestinian Territory, according to Hindi, is not at all far off from operating as its own independent state: it has a moderately centralised government in the Palestinian Liberation Organization (PLO), definite territory (though some portions of it are still contested), and it frequently engages in international affairs. It has signed/ratified most major conventions from the Geneva Conventions, to the Convention Against Torture (1984) and was granted observer-state status in the UN General Assembly in November 2012. Since peaceful negotiations between Israel and Palestine are anything but settled, the bold initiative offered by Hindi is interesting if nothing else. Staying true to the tone of his entire speech, he finished with a quote from Malcolm X, "nobody can give you equality or justice or anything. If you're a man, you take it".

Finishing the Job in the Balkans: A Panel Discussion at The Hague Institute of Global Justice

By Jérôme Temme

On 16 July, the Hague Institute for Global Justice hosted a discussion featuring prominent figures in the debate on the future of the Balkans. Ambassador Nikola Dimitrov, a Distinguished Fellow of the Institute, moderated the panel and presented two pictures of the Balkan region. On the one hand the European Union (EU) enlargement has been successful in that Croatia joined the EU as the 28th member state in 2013. On the other hand, the Balkan states remain weak as non-functioning democracies: reconciliation seems unsatisfying, freedom of press is merely a distant ideal and the countries suffer from leadership problems as accession to the EU seems like a very distant goal. Finally, enlargement becomes more and more unpopular in the European Union. Should all Balkan states eventually join the EU? Few people deny this, but should all Balkan countries join at the same time? Can accession talks start right now? Is the EU ready itself for new, economically less developed, members?

Former Dutch Ambassador Daphne Bergsma represented the Dutch official stance: EU accession of the Balkan countries is the main goal, but the "job" does not end there. Rather, European values like the Rule of Law and Human Rights have to be adopted by the potential new members. While those values become more central to the discussion, economic governance still lacks a prominent place in those accession discussions.

Frome Right to Left: Dr. Daniel Serwer, Stefan Lehne, Nikola Dimitrov, Daphne Bergsma, Dr. Dimitar Bechev and Pieter Feith

Stefan Lehne from the Austrian Foreign Ministry criticised Jean-Claude Juncker's statement from the previous day when he said that there would be no further enlargement in his coming presidency as the EU had to digest the accession of 13 Members States in a short time. While Juncker stated an undisputed and obvious fact, it sends an unnecessarily negative message to the Balkans. In a nutshell, the EU asks Balkan leaders to get rid of corruption, to strengthen the Rule of Law, to stabilise the economy and to do many other things, but then only provides the distant opportunity of eventually opening open-ended accession talks. In any case, accession would be granted only long after the current leaders are out of power. If the EU continues to present absolutely no motivation to take any political risks for the current leaders, there can be no successful development, according to Lehne. The only solution, hence, is to bring all countries within a one to three year distance to opening accession talks, as no talks equal no progress.

Dr. Daniel Serwer, a scholar from the John Hopkins School of Advanced International Studies and Dr. Dimitar Bechev from Oxford University listed several of the problems for the Balkans. According to Serwer, the Balkans are not within the 50 or even 100 priority topics for the United States (US) government anymore. However that is not a problem, because the Balkans have received an amount of international attention over the last 15 years which is out of proportion to the actual importance of the region in a global setting. Therefore, he explains, "finishing the job in the Balkans" means finishing the "emergency attention" paid to the Balkans and sending the countries on a path towards EU accession. By no means does "finishing the job" suggest resolving the problems of the region once and for all.

Bechev stressed the disadvantageous geo-political situation for enlargement. Following the recession, public support for enlargement died down not only in the economically strong Western Europe, but even in the newly admitted countries of Eastern Europe. Finally, in light of the Ukraine situation, potential members might ask themselves if believing in Europe

will prove just as unsuccessful for them as it did for North-Western Ukraine.

As the last speaker, Ambassador Pieter Feith stressed the importance of sending diplomats to implement local solutions such as establishing the Kosovo Constitutional Court instead of sending intervening politicians. In general the EU has acted more and more with a top-down interventionist approach, rather than with the traditional bottom-up one. This, however, is of little help especially when it comes to furthering the Rule of Law and similar broad aims that require practical assistance applied on the ground.

What, then, is the future for the Balkans? What I will take away from this discussion is that EU accession is certainly no panacea for the region. But not giving the Balkans good prospects of joining the exclusive club is no solution either, as accession seems to be the best motivation for progress. What is missing? Firstly, reconciliation did not feature very prominently in the discussion, at least not as prominently as anyone working in the international justice community would expect. What makes reconciliation difficult is that Serbia continues to be seen as the "bad guy", according to Ambassador Feith, and this makes it too easy for Croatia, Bosnia, and others to pin the blame for lacking reconciliation on Serbia. As Lehne pointed out, normalisation of relations might be as good a substitute for reconciliation as the societies will get. Secondly, is it an additional problem that accession of the Balkans might dilute the "EU values"? While this is seen as a major problem in the case of Turkey, in my mind, the case of the Balkans is different: their history is already inevitably part of European history and some countries are already EU members. Furthermore, the relative size of the remaining Balkans makes sure that values are unlikely to be an insurmountable hurdle – at least if there is political will.

What remains to be said is that however much the economic situation makes things difficult, whatever happens in the region politically, at the moment - and this has remained unchanged for a long time - there is no reasonable alternative to a long-term accession of the Balkan states to the European Union.

Using Human Security as a Legal Framework to Analyse the Common European Asylum System—Part II

By Isaac Amon

Continuing from "Human Security and the Common European Asylum System-Part I", published in newsletter 71, the afternoon sessions approached the idea of "human security" from a policy-oriented viewpoint, focusing predominantly on two themes. First, the positive value of a human security approach was emphasised, especially vis-à-vis protection rights of asylum seekers and the extent to which reception conditions in EU member states comply with EU and international human rights obligations. Second, the conflict of "human rights" and "human security" was starkly laid out in detail regarding the real life situation of the "migration-security nexus" of the southern Mediterranean.

In the third session, which focused on analysing protection rights of asylum seekers, the first speaker was Dr. Robert K. Visser, Executive Director of the European Asylum Support Office (EASO). He began his lecture by acknowledging that migration has been associated with mankind since time immemorial. In fact, this phenomenon was so important that it is recorded at the very beginning of the Bible. As Visser remarked, "when Adam and Eve left paradise, they were the first migrants". Consequently, a grave tension has always existed between two different and often contradictory realities. On the one hand, the theory of universal values, or the inherent rights of man or human rights, has firmly become embedded within international law, and within the political calculus of States as well. In practice, the rights afforded to individuals may differ, but the concept of human rights is undisputed today.

On the other hand, since the beginning of recorded history and probably even before, humanity has banded together collectively, forming close-knit groups to ensure security for members of the group. This imperative to provide "human security" is manifested through tradition, culture and the all-

encompassing term “way of life”.

Whether modern nation-states can strike a proper balance between these two principles is a very acute challenge, perhaps now more than ever before in human history. Thus, the problem of asylum seekers fleeing a conflict torn area, or simply seeking a better future for themselves and their families, confronts decision makers with a choice. Who are the asylum seekers? According to Visser, they are people in need of international protection. They sometimes flee their homes with nothing more than the clothes on their back. They seek not only a physically safe place to live, but also a recognised place in the greater society, with attendant legal protections.

The core of this “human rights” vs. “human security” debate stems from the “Convention relating to the Status of Refugees”, (often referred to as the Geneva Convention of 1951) which although it dealt only with regional situations of internally displaced persons, has become a template for States on how to effectively deal with migration on a massive scale. Following the massive death and destruction, as well as forced population transfers and exchanges of the Second World War, this Convention attempted to harmonise national viewpoints regulating migration into a single supranational perspective. It truly was the beginning of a comprehensive European framework. In the end, countries have no choice but to make a deliberate decision, attempting to strike the proper balance between “human rights” and “human security” as well as between national and supranational points of view and accompanying legislation.

The next speaker was Dr. Lieneke Sligenberg, Assistant Professor at VU University Amsterdam, who specialises in migration law. Speaking from the perspective of an academic, she discussed the challenges that have hampered the application of the Common European Asylum System (CEAS) and its guarantees of a right to asylum. Similar to Visser, she began by emphasising the importance of the Geneva Convention of 1951 and the Additional Protocol of 1967, which is an international obligation and is a right enshrined in the European Union Charter of Fundamental Rights under Article 18.

Sligenberg spent much time speaking about the importance of the Reception Conditions Directive and how it was changed over the past decade by the European Parliament and the Council. This Directive deals with access to reception conditions for asylum seekers while they wait for their respective claims to be examined. Importantly, this Directive ensures that dignity is afforded to all claimants in that they are provided with food, housing, healthcare, employment, and access to medical care. Prior to the Directive, reception conditions in member states differed dramatically. Thus, the adoption of this Directive aimed to harmonise the different practices of all member states.

On 27 January 2003, the EU promulgated the first Directive, 2003/9/EC, applicable to all member states, with the exception of Ireland and Denmark. This directive ensured access to the labour market within a 1 year period for asylum seekers (Article 11), as well as ensured freedom of movement to asylum seekers within the territory of a host Member State (Article 7(1)). However, it did permit Member States to place restrictions on asylum seekers to make provision of the material reception conditions subject to actual residence by the applicants in a specific location (Article 7(4)). Another important part was Article 16, which permitted member states to reduce or withdraw reception benefits when certain conditions occurred.

On 26 June 2013, the European Parliament and Council changed the Reception Conditions Directive, and created Directive 2013/33/EU. Ireland and Denmark continued to opt out, with the United Kingdom joining them as well. Most Articles stayed the same or quite similar to the 2003 Directive. For example, Article 15(1) decreased the amount of time, from 1 year to nine months, asylum seekers need to wait in order to be admitted into the labour market. Similarly, Article 20 continued to permit Member States to reduce or withdraw material reception conditions to applicants, but added the important caveat of only in “exceptional and duly justified cases”.

Perhaps the most significant change was Article 17(5), which provided that “Member States may grant less favourable treatment to applicants compared with nationals in this respect, in particular where material support is partially provided in kind or where those level(s), applied for nationals, aim to ensure a

standard of living higher than that prescribed for applicants under this Directive". Consequently, although this new Directive was an attempt to grant greater flexibility to Member States, it is quite possible that the harmonisation that the Directive originally sought between Member States of the EU may now be reversed and fragmentation will set in again.

As speakers at the morning sessions mentioned as well, there have been a string of tragedies off the coasts of southern Member States of the EU, with many migrants seeking asylum being detained, tortured, and often drowning in the process. Many elements of the EU asylum process currently focus on surveillance and management of border control, raising questions as to their compliance with human rights standards and ultimate quality of refugee protection.

Dr. Paolo Cuttitta, a researcher at VU University Amsterdam, spoke about the controversial case of the "Cap Anamur", and Italy's various attempts to regulate the flow of asylum seekers in the southern Mediterranean in the decade since. In June 2004, the German ship Cap Anamur picked up 37 African refugees from a sinking inflatable boat in the Mediterranean, near the Italian island of Lampedusa. When the Cap Anamur attempted to dock at the nearest port in Sicily, permission was initially granted, but then revoked. In order to ensure that the asylum seekers would not touch Italian territory, the Coast Guard was sent to force the Cap Anamur back out to sea. For 11 days, although the situation deteriorated onboard, the ship was not permitted to enter Italian territorial waters. Only when the Captain issued an emergency call was the ship permitted to dock.

However, the Director of Cap Anamur, a relief organisation, along with the Captain and the first officer were arrested after touching foot on Italian soil. They were accused of helping illegal immigrants, and the ship was impounded by the authorities. As for the asylum seekers, they were immediately detained, their asylum claims were expeditiously reviewed and denied, and the asylum seekers were bereft of legal counsel.

In 2009, the Captain, the First Officer and the director were acquitted of the charges. Yet, in the decade since the Cap Anamur incident, the number of migrants attempting to enter the EU from conflict prone areas has increased, and it is estimated that 60.000 migrants have landed in Italy as of June 2014. It is further estimated that the cost of the Italian authorities patrolling the sea lanes and forcibly preventing the migrants from touching Italian soil has increased from 1.5 million euros per month in 2004 to 10 million euros per month as of 2014. These Italian Coast Guard and Navy ships, according to Cuttitta, are essentially floating detention centres, with policemen on board and torture routinely being inflicted upon the asylum seekers before they are unceremoniously returned to the place from which they fled.

Ultimately, the deaths of these migrants (even as recent as October 2013, where more than 350 Libyans died whilst attempting to reach Lampedusa) reveal the human dimension of this debate between "human rights" and "human security". In the end, as Visser concluded, "the history of mankind is the history of migration", and because of this, these two principles will continue to spark debate for a long time to come.

Charles Taylor's Motion to Leave UK

By Lucy Turner

Ex-Liberian president Charles Taylor has formally requested that he be transferred to a prison in Africa. The 66 year old is currently detained in Her Majesty's Prison Frankland, near Durham in the United Kingdom (UK), where he is serving his prison sentence for eleven counts of war crimes and crimes against humanity, relating to his role in the Sierra Leone Civil War. Taylor was apprehended in Nigeria in 2006, and brought before the Special Court for Sierra Leone (SCSL) in Freetown. However, when his presence at the court was deemed to be destabilising and compromising to the security of the court and region, Taylor was moved to The Hague where his trial made use of the facilities of the International Criminal Court and, subsequently, the Special Tribunal for Lebanon.

It has been erroneously reported in UK newspapers, such as the Daily Mail, Telegraph and Independent, that Taylor is "suing" the British government for de-

priving him of his right to a family life and failing to ensure his personal safety in prison. Taylor is not suing the UK government, nor is he seeking any damages; the Motion requests that the conditions of Taylor's enforcement comply with international standards of detention, if necessary by terminating the enforcement and ordering a transfer to another state. The Motion suggests that Taylor serve the remainder of his 50-year sentence in Rwanda, in order to accommodate visits from his family, ensure his safety and prevent his isolation.

Furthermore, the case is not against the British government; the Motion appealing for his transfer has not been filed with the government, but with the Residual Special Court for Sierra Leone (RSCSL) which is accountable for determining where Taylor serves his sentence, and moreover, the Motion stipulates, for supervising that detention, as set out in Article 3 of the Enforcement of Sentences Agreement between the Court and the UK on 10 July 2007 (SCSL-UK Enforcement Agreement). Alluding to Article 9(2) of the Agreement, the Motion invites the RSCSL to immediately exercise its authority by terminating the enforcement of Taylor's sentence in the UK, and transferring him to Rwanda, or to The Hague "pending further deliberations". On this issue the Motion also emphasises the obligation of the RSCSL to ensure that conditions of detention comply with international standards of human rights, as supported by Appeals Chambers judgments at both the ICTY and ICTR (see *The Prosecutor vs Muyakazi*, *The Prosecutor vs Uwinkindi,* amongst others). Taylor is represented by ADC-ICTY Vice-President Christopher Gosnell and ADC member John Jones QC.

Following an exegesis of the RSCSL's power and obligation to act on the matter of enforcement, Taylor's Motion consists of three principle claims. Firstly, that Taylor's conditions are such that he is ostensibly held in isolation, as he resides in the prison hospital wing owing to concerns for his safety, which the lawyers assert breaches international standards on the segregation of prisoners. Secondly, it is claimed that there has been at least one threat to Taylor's life in an anonymous letter apparently originating from within the high-security prison, in respect of which he has not received adequate information or protection. Finally, the Motion asserts that Taylor's Right to Family Life is being violated, as the UK immigration authorities have denied Taylor's wife and three young daughters entry into the UK in order to visit him, as they did regularly in The Hague, and because he is unnecessarily detained in a foreign continent.

During the enforcement in the UK Taylor has received threats against his life, possibly from within the facility, and the prison authorities have assessed him to be sufficiently at risk so as to warrant his detention in a separate hospital ward, effectively in isolation from other prisoners. In contrast, the Motion asserts that Rwanda would be able to provide Taylor with a safe environment without necessitating his virtual isolation, as all SCSL prisoners in Rwanda are held together in a single designated facility, separate from other prisoners. Referring to European Court of Human Rights (ECtHR) jurisprudence, the Motion avers that even 'relative isolation' cannot be imposed on a prisoner indefinitely (*Ramirez Sanchez v. France*), and posit that his conditions constitute a breach of international standards on the segregation of prisoners.

Taylor and his lawyers feel that he would also be safer in a Rwandan prison. Taylor's insistence that he would be more comfortable in a Rwandan prison is both unexpected, given the reported hardship of prisons in Rwanda, and can be seen as ironic in light of the criticisms levelled at the ICTY and the ICTR: both courts have made use of Western prisons, and have faced criticism that many of these prisons provide better conditions than would otherwise be received in the home countries of the offenders.

The concerns for Taylor's safety have credibility, despite the better general conditions of Western prisons, and the history of the UK for protecting war criminals is not unscathed: in 2010 Radislav Krstić, a Bosnian Serb who was serving a 35-year sentence in a UK prison for his participation in the Srebrenica massacre, was stabbed in his cell by three Muslim inmates. The ICTY was, the Motion asserts, sufficiently concerned about the UK prison's ability to accommodate Krstić safely as to transfer him back to the Netherlands and then to Poland, where he is serving the remainder of his sentence.

The Motion details that, due to problems obtaining visas, Taylor's family has been unable to visit him. In the eight months of Taylor's detention, the UK Foreign Office has so far declined to grant visas to Taylor's family on the grounds that his wife and children would not intend to leave the UK and return to Liberia following a visit, as his wife is unable to prove that

she has “settled circumstances in Liberia”. The Motion asserts that this constitutes a violation of Taylor’s Right to Family Life, as enshrined in the European Convention on Human Rights (ECHR) (by which the UK is bound), the Banjul Charter, and the International Covenant on Civil and Political Rights. Such a right, the Motion states, contains the right of prisoners to be visited by their families, even going so far as to claim that a detained person’s access to their family can constitute a right in itself, as embodied in Principle 19 of *The Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment* (1988).

Citing ECtHR jurisprudence, Taylor’s lawyers assert that detaining a prisoner unnecessarily far from the habitual residence of family members, or otherwise creating obstacles that prohibit periodic visits, constitutes a violation of international standards of human rights: in *Khodorkovskiy v. Russia* the court found that a two-day travel time for his family to visit constituted a breach of his rights under Article 8 of the ECHR. Additionally, the breach arose not only from a *de jure* effect on Khodorkovskiy’s Article 8 rights, but from a *de facto* one: as a product of the prolonged journey and their young ages, Khodorkovskiy’s young children had not been able to visit him once in the course of a year. Thus, *de facto* considerations such as the relative financial burden on Taylor’s family of travel and accommodation costs, and the duration of journey to the prison, are to be considered in a decision assessing the interference in Taylor’s Article 8 rights.

The Motion further proposes that Taylor’s family members’ Article 8 rights are also mitigated by the separation, and that both the host state and the RSCSL have an obligation to conserve these rights: in *Beoku-Betts v Secretary of State for the Home Department* the UK Supreme Court found that there is “only one family life”, shared by each member of the family in question.

Given that the UK agreed in 2006 to host Taylor’s prison term if he was convicted, as part of a deal with the SCSL that Taylor would be tried in the Netherlands, it is surprising that the government has not anticipated the foreseeable visa issues that would arise from his family inevitably requesting to visit him.

The claim has substantial strengths, and it seems improbable that the UK will attempt to contest this request for transfer to Rwanda. Resisting the claim in an attempt to retain Taylor, a man convicted in the Netherlands for crimes committed in Sierra Leone and Liberia, so as to continue his detention in England at an annual cost to the taxpayer said to be around £80.000, with nearly 49 years of his sentence outstanding, is not going to be a popular move with the electorate. Furthermore, Taylor is the only person convicted by the SCSL, or any international court, to serve their sentence in a foreign continent. After being sentenced to serve his prison term in the UK in 2012, lawyers objecting to his sentence claimed that "That [he] should serve his sentence in a prison, culturally and geographically thousands of miles from his home, should be considered a factor in mitigation, as it in fact amounts to exile”. One of the principle threads of the claims now made in the Motion is that there is little that can change in the circumstances, which subsequently gives rise to the claim: Taylor’s notoriety will always render him vulnerable or isolated in a prison without specific facilities; his wife will continue to lack the financial means to convince the UK Foreign Office that she intends to return to Liberia following a visit; and the journey from Liberia to the UK will continue to be both expensive and arduous. If being deprived of contact with his family for eight months is insufficient to find a violation of Taylor’s Article 8 rights, the longevity of his sentence is likely to influence the decision.

With these factors in mind, the question remains; why did the UK agree to imprison Taylor? The rationale provided was that no country in the region had the facilities or the resolve to host the trial and imprison Taylor safely and mitigate any potentially destabilising effects to the area that might ensue. The UK Foreign Minister at the time, Margaret Beckett, committed the UK to hosting Taylor should he be convicted after being tried in the Netherlands, citing the UK’s “commitment to international justice”. However, with no outstanding verdict, sentencing or evidence left to be heard, and only a substantial detention remaining, the “destabilising effect” that Taylor’s presence was thought to prompt could now be deemed partially lessened, strengthening Taylor’s claim that he can now return to West Africa. It remains unclear what incentives remain for the UK, particularly due to the current difficulties arising from Taylor’s detention, embodied in his Motion for transfer.

BLOG UPDATES AND ONLINE LECTURES

Blog Updates

Abel S. Knottnerua, **Emerging Voices: Extraordinary Excpetion at the ICC—What Happened with Rule 134 *quater*?** 18 July 2014, available at: http://tinyurl.com/m4qn84j.

Imran Khan, **Religious Prejudice in the 'Islamic State'?** 18 July 2014, available at: http://tinyurl.com/pyagg6w.

Dominik Zimmermann, **Former ICC Judge Hans-Peter Kaul Passes Away**, 23 July 2014, http://tinyurl.com/n77suxb.

Julien Maton, **UN Condemns Military Action in Gaza**, 23 July 2014, available at: http://tinyurl.com/mfod3tx.

Online Lectures and Videos

"HIRC Anniversary Plenary Panel: Strategies for Advancing Immigrants' Rights", by Deborah Anker, Stephen Legomsky, Lee Gelernt and Mark Fleming, 18 July 2014, available at: http://tinyurl.com/nrl3blx.

"HIRC Anniversary Plenary Panel: Reflections on 30 Y earrs *of Social Justice Lawyering",* by Bernard Wolfsdorf, Ira Kurzban, Margaret Stock, and David Thronson, 18 July 2014, available at: http://tinyurl.com/mj7ue4a.

"CARTA: Violence in Human Evolution: Resources and War, Culture, Hunter-Gatherers and Human Nature", by Carol Ember, Polly Wiessner and Robert Kelly, 22 July 2014, available at: http://tinyurl.com/ow3do64.

PUBLICATIONS AND ARTICLES

Books

Shane Darcy (2014), *Judges, Law and War: The Judicial Development of International Humanitarian Law*, Cambridge University Press.

Robert Lee (2014), *Blackstone's Statutes on Public Law and Human Rights 2014-2015, Twenty-Fourth Edition,* Oxford University Press.

William H. Boothby (2014), *Conflict Law—The Influence of New Weapons Technology, Human rights and Emerging Actors*, T.M.C. Asser Press.

Juliet R. Amenge Okoth (2014), *The Crime of Conspiracy in International Criminal Law*, T.M.C. Asser Press.

Articles

Cecily Rose (2014), "The Protection of Communications between States and Their Counsel in International Dispute Settlement", *The Cambridge Law Journal*, Vol, 73, No.2.

Geoffrey Gordon (2014), "Innate Cosmopolitan Dialectics at the ICJ: Changing Perceptions of International Community, the Role of the Court, and the Legacy of Judge Álvarez", *Leiden Journal of International Law*, Vol. 27, No. 02.

Marny A. Requa (2014), "A Human Rights Triumph? Dictatorship-era Crimes and the Chilean Supreme Court", *Human Rights Law Review*, Vol. 12, No. 01.

CALL FOR PAPERS

The **Göttingen Journal of International Law** has issued a call for paper for its 2014 Student Essay Competition on "The International Law of the Sea".

Deadline: 15 September 014 More Info: http://tinyurl.com/om97rc5

The **German Yearbook of International Law** has issued a call for papers for its upcoming edition.

Deadline: 22 September 2014 More Info: http://tinyurl.com/m893w5j

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NEW WEBSITE

The ADC-ICTY would like to express its appreciation and thanks to Douglas Chalke, Jelena Djuric, Danielle Dudding and Paul Stokes for all of their hard work and dedication to the Newsletter. We wish them all the best in their future endeavours.

The ADC-ICTY wishes everyone a lovely summer recess. The ADC Newsletter will resume publication after the break.

EVENTS

Use of Military Evidence in Counter Terrorism

Date; 29 August 2014

Location: T.M.C. Asser Instituut, The Hague

More Info: http://tinyurl.com/nvhtq48

Illegal Armed Force as a Crime Against Humanity

Date: 2 September 2014

Location: T.M.C. Asser Instituut, The Hague

More Info: http://tinyurl.com/kvawa9q

Transitional Justice in the North East Asia Region

Date: 2 September 2014

Location: The Hague Institute for Global Justice

More Info: http://tinyurl.com/o4bz5a2

OPPORTUNITIES

Associate Information Analyst, (P-2) Juba

United Nations Mission to the Republic of South Sudan

Closing Date: 1 August 2014

Associate Legal Officer, (P-2) Arusha

International Residual Mechanism for Criminal Tribunals

Closing Date: 9 August 2014

Legal Officer, (P-3) The Hague

International Criminal Tribunal for the Former Yugoslavia

Closing Date: 14 August 2014

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