ADC-ICTY Newsletter, Issue 20

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Cases at Trial

Haradinaj et al. (IT-04-84)

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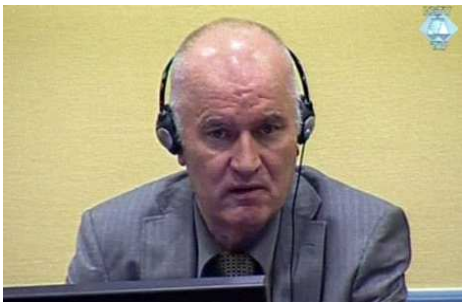
ICTY News

* The views expressed herein are those of the authors alone and do not necessarily reflect the views of the International Tribunal for the Former Yugoslavia or the Association of Defence Counsel Practicing before the ICTY.

Prosecutor vs. Mladić (IT-09-92)

The Defence for former commander of the VRS Main Staff, General Ratko Mladić, filed an opposition to a motion submitted by the Prosecution which sought to separate Mladić's trial into two phases. General Mladić's Lead Counsel, Branko Lukić , argued in the reply on 31 August, that granting the request would negatively affect Mladić's right to a fair trial.



Ratko Mladić

On 16 August the Prosecution filed a motion that sought to sever the second indictment against Ratko Mladić into two indictments, "Srebrenica" and "Sarajevo, Municipalities and Hostages". The Office of the Prosecution proposed that the "Srebrenica" indictment be tried first followed by the "Sarajevo, Municipalities and Hostages". Lastly, the Prosecution sought to amend the "Srebrenica" indictment to include the alleged crime committed in Bisina.

The Defence filed a response in opposition on the grounds that the Prosecution confused common-law legal principles. They argue that the motion is inconsistent with ICTY jurisprudence, the request is contrary to the law in place at the time of the acts and that the Prosecution's request would result in undue prejudice to General Mladić's right to a fair trial and violate Mladić's presumption of innocence.

In the response the Defence argued that, "the accepted ICTY rules on statutory interpretation state that, when determining what rights a Rule specifically guarantees, consideration should be given to the purpose behind the Rule the Chamber is interpreting". Additionally, the Defence argued that, the Prosecution "failed to specify the precise Rule it believed can be interpreted to give rise to the exercise of severance in the manner proposed".

Branko Lukić

The response then stated that the Prosecution's request is contrary to the law in place at the time of the acts and the principle of legality prohibits the retroactive application of "new" law. They stated, "The SFRY Criminal Procedure

Code that was in force during the time period of the indictment would not have permitted severance in the manner sought".

According to Article 20 the Accused has a right to a fair trial and the Defence contends that the motion submitted by the Prosecution seriously compromises this principle. The response noted that two trials would violate the principle of the equality of arms because it put the Defence in a disadvantageous position as the Defence's resources do not match that of the Prosecution's. The Defence suggested that if the motion is granted, 3-4 more defence teams would be required to ensure fairness in each trial/appeal. In addition, paragraph 26 of the motion proposed to start the second trial immediately after the first trial would be finished. The Defence argued that this would force them to begin pre-trial preparation while the trial regarding Srebrenica was being heard, which would further limit the resources available to the Defence.

In its response the Defence drew attention to the fact that the events and facts related to "Sarajevo, Municipalities, and Hostages" in the proposed indictment precede the "Srebrenica" indictment. In presenting the facts, Srebrenica first, the Defence argued that it would lead to disruptions of case-preparations as well and difficulties in understating the facts of the case. Lastly, the Prosecution's request would violate the presumption of innocence as there is the position for factual findings to be made by the Chamber deemed corollary in the first trial, which could be used against General Mladić in the second trial. This may occur due to the overlapping factual matters, particularly if both are heard by the same Chamber.

Article 20

Commencement and conduct of trial proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

Prosecutor v. Karadžić (IT-95-5/18-I)

On 23 September 2011, the Trial Chamber rendered its decision on the Prosecution's motion to subpoena Milan Tupajić, filed on 8 September 2011. The Prosecution requested that the Chamber issue a subpoena for the witness to appear on 3 October 2011, accompanied with an order to the authorities of Bosnia and Herzegovina (BiH) to provide assistance in serving the subpoena. Milan Tupajić was the President of the Sokolac Municipal Assembly and later in 1992 became the President of the Crisis Staff in Sokolac. His evidence is expected to relate to the communication and execution of policies between the municipal level and the national Serb leadership. He would further be expected to testify about crimes committed against non-Serbs and Karadžić's authority within Republika Srpska. His testimony would be relevant to Karadžić's criminal responsibility as charged in the Indictment, specifically to Count 1 and Counts 3 to 8. Karadžić did not respond to the motion.

Article 54 General Rule

Rule 54 of the Rules provides that the Trial Chamber may issue a subpoena when it "necessary for the purpose of an investigation or the preparation or conduct of the trial".

The Chamber noted that it was satisfied that Milan Tupajić's testimony was relevant to a number of issues related to the Prosecution's case. It also stated that given the nature of his testimony, this evidence was not obtainable through other means. It accepted that the Prosecution had made reasonable attempts to secure his testimony but Milan Tupajić would not voluntarily cooperate. As a result, it granted the Prosecution's motion and issued a subpoena for the witness, as well as an order to serve the subpoena directed to the government of BiH.

Milan Tupajić

On this same day, the Chamber issued its decision on the Prosecution's motion for a video-conference link for the Testimony of witnesses Asim Egrlić (KDZ258) and Atif Džafić (KDZ225), filed on 20 September 2011. The Prosecution sought to call these witnesses on 29 and 30 September 2011 via video-conference in accordance with Rule 81bis, due to their health conditions, which made them unable to travel to Tribunal in The Hague. The Prosecution provided medical information in confidential annexes in support of its motion, which were dated from 2009. It argued that their testimony was sufficiently important to the trial to make it unfair to proceed without it.

Karadžić responded the next day, on 21 September 2011, by opposing the motion. He argued that the medical information provided by the Prosecution dates back to 2009, is thus outdated, and does not indicate why they were unable to travel to The Hague. He conceded to the importance of their testimony but pointed out that these Witnesses had not indicated that they would not come to The Hague if required to do so. He further added that he would be prejudiced by not being able to confront the witnesses face to face.

Radovan Karadžić

In relation to Atif Džafić, the Chamber noted that Prosecution made inquiries and confirmed the continuing nature of his medical condition, which impacted his ability to travel. However, in relation to Asim Egrlić, the Chamber required more contemporaneous medical documentation before it could decide whether he was in fact unable to travel to The Hague. It noted that the parties agree about the importance of the testimony to be given by these witnesses and added that hearing testimony via video-conference does not violate the rights of the Accused to cross-examine the witness or confront the witness directly. Consequently, the Chamber granted the motion in relation to Atif Džafić but denied it for Asim Egrlić.

The Prosecution case then continued on 27 September 2011 with the testimony of witness KDZ-192 in closed session. The next Prosecution witness called was Nusret Sivac, a journalist and former police officer in Prijedor who was later detained at "Manjača" and "Trnopolje" camps during the relevant period. He was heard before the Chamber on 28 and 30 September. In his cross-examination, Karadžić brought up excerpts of the witness' book which were used to test his credibility by suggesting that Sivac had a bias against Serbs. As ordered by the above-mentioned video-conference decision of 23 September, the witness Atif Džafić testified via video-link on 30 September. He was the chief of police in Ključ who later detained at "Manjača" camp during the relevant period. Karadžić disputed the evidence of the witness, noting that only a small number of the 17,000 non-Serbs living in Kljuc were detained and adding that there were legitimate reasons for this witness' own detention.

Asim Egrlić

Trial Chamber rejects Šešelj's request to discontinue proceedings

On Thursday 29 September 2011 the Trial Chamber rejected an oral request by the leader of the Serb Radical Party, Vojislav Šešelj, to discontinue proceedings in his case. The Chamber found that he had failed to prove that his right to a trial within a reasonable period had been violated.

Šešelj has been in detention since 2003 and is indicted for alleged war crimes committed between 1991 and 1994 against the non-Serb population from large parts of Bosnia and Herzegovina, Croatia and Vojvodina, Serbia. He is being tried for 14 counts of crimes against humanity and violations of the laws or customs of war.

The Chamber referred to its earlier decision of 10 February 2010, which argued that according to international and European jurisprudence "there is no predetermined threshold with regard to the time period beyond which a trial may be considered unfair on account of undue delay". It further held that Šešelj failed to provide concrete proof of abuse of process, besides the fact that his trial is still ongoing.

Rule 81bis

Rule 81 bis provides that "at the request of a party or *proprio motu*, a Judge or a Chamber may order, if consistent with the interests of justice, that proceedings be conducted by way of video-conference link".

The Chamber has outlined the criteria which need to be satisfied before a witness is permitted to give his or her testimony via video-conference link, namely:

i. the witness must be unable, or have good reasons to be unwilling, to come to the Tribunal;

ii. the witness's testimony must be sufficiently important to make it unfair to the requesting party to proceed without it; and

iii. the accused must not be prejudiced in the exercise of his or her right to confront the witness.

Vojislav Šešelj

According to the Chamber, Šešelj's comparison of the length of his detention to that of other accused in other national and international jurisdictions is "not relevant and notes that some trials have far exceed the length of his".

The Chamber notes that since its decision of 10 February 2010, proceedings have not been delayed nor suspended and Šešelj has not requested to be provisionally released.

The initial indictment against **Vojislav Šešelj** was confirmed by Judge Gon Kwon on 14 February 2003. The indictment alleged that Šešelj is guilty of persecutions on political, racial or religious grounds, inhumane acts, murder, torture, cruel treatment, and destruction. The trial commenced on 27 November 2006.

News from International Courts and Tribunals

International Criminal Court

ADC member Dieckmann appointed Common Legal Representative

On 14th September 2011 ADC member Jens Dieckmann was designated as Common Legal Representative, associated counsel, representing all victims participating in the case, 'The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus,' situation in Darfur, Sudan (No. ICC-02/05-03/09). The decision was taken by the ICC registrar following from Trial Chamber IV's 'Order inviting the Registrar to appoint a common legal representative' dated 7 September 2011. A summary of the selection process is as follows:

- A document was sent to lawyers on the Registry's list of counsel inviting persons wishing to represent victims in the case to present to their interest;
- Counsel were informed of the criteria and asked to provide a curriculum vitae and information indicating their suitability in relation to the criteria;
- 11 Counsel were shortlisted and requested to provide answers to two follow up questions;
- Lastly 5 Counsel were invited to undertake a telephone review.

Jens Dieckmann

Mr Dieckmann has been a board member of the ICTY since 2006 and Vice-President of the International Criminal Defence Lawyers (ICDL) since 2007. He founded the firm Dieckmann & Law in 1997.

International Criminal Tribunal for Rwanda

Two convicted, two acquitted in 'Government II'

On Friday 30 September 2011, Trial Chamber II of The International Criminal Tribunal for Rwanda passed its judgement in the 'Government II' case. The Trial Chamber acquitted Rwandan ex-ministers Casimir Bizimungu and Jérome Bicamumpaka on all charges for lack of sufficient evidence, and ordered their immediate release. It imposed 30- year prison sentences on two other members of the former interim government, Justin Mugenzi and Prosper Mugiraneza, who were convicted of conspiracy to commit genocide and direct and public incitement to commit genocide.

Justin Mugenzi and Prosper Mugiraneza

Judge Emile Short issued a partially dissenting opinion on the sentence, saying the two men convicted deserved a reduction of five years for violation of right to trial without undue delay.

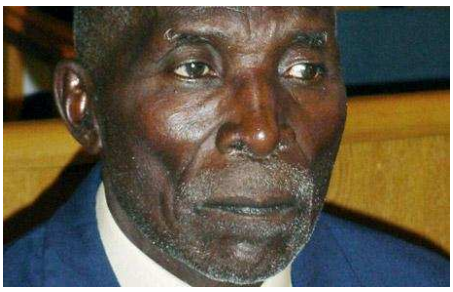
The four ex-ministers were jointly charged with genocide, conspiracy to commit genocide, complicity in genocide, direct and public incitement to commit genocide, crimes against humanity, and war crimes. At the time of the 1994 genocide, Mugenzi was Rwanda's Minister of Commerce while Mugiraneza was Minister of the Civil Service. Bizimungu was the Minister of Health, and Bicamumpaka was the Minister of Foreign Affairs. Mugenzi, Mugiraneza and Bicamumpaka were arrested in Cameroon on 6 April 1999, and Bizimungu was arrested in Kenya on 11 February 1999.

The trial commenced on 6 November 2003 and over the course of 399 trial days, the Trial Chamber heard evidence from 171 witnesses. The evidence phase of the case closed on 12 June 2008 and closing arguments were heard between 1 and 5 December 2008. Delivery of their judgment comes 12 years after the accused were arrested and nearly eight years after their trial began.

Appeals Chamber upholds two convictions

On 29 September 2011 the Appeals Chamber of the International Criminal Tribunal for Rwanda affirmed the convictions and sentences of Lieutenant Colonel Ephrem Setako and Yussuf Munyakazi.

On 25 February 2010, Trial Chamber I found Setako, former head of the Division of Legal Affairs in the Rwandan Ministry of Defence, guilty of genocide, crimes against humanity and serious violations of the Geneva Conventions, and sentenced him to 25 years in prison. It is alleged that he ordered the executions of 30 to 40 ethnic Tutsis at Mukamira military camp on 25 April 1994 and some 10 other Tutsis there on 11 May. The Trial Chamber confirmed his convictions for extermination as a crime against humanity and for violence to life, health and physical or mental well-being of persons as a serious violation of the Geneva Conventions that govern the treatment of prisoners of war.



Yussuf Munyakazi

The Appeals Chamber composed of Judges Patrick Robinson, presiding, Mehmet Güney, Fausto Pocar, Liu Daqun and Carmel Agius dismissed his appeal in its entirety and granted the Prosecu-

Prosper Mugiraneza (1957) was a prominent member of the MRND party. Mugiraneza entered government in 1991 as Minister for Labour and Social Affairs before becoming Civil Service Minister in 1992.

Justin Mugenzi, (1949) was a founder member of the Liberal Party (PL) and later led its Hutu Power faction.

Mugenzi and Mugiraneza were arrested in Cameroon on 6 April, 1999 and transferred to the ICTR Detention Facility in Arusha on 31 July of the same year.

tion's appeal in part. The Chamber affirmed his convictions for genocide, and entered a new conviction for murder as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. However, the Chamber ruled that the additional conviction did not warrant an increase in Setako's sentence. The Appeals Chamber stated that the sentence was subject to credit being given under the Rules 101(C) and 107 of the Rules for the period Setako has already spent in detention.

On 30 June 2010, Munyakazi, a former farmer and landowner, was found guilty of genocide and extermination as a crime against humanity and was given a 25 year prison sentence. The Tribunal found that he had been involved in the deaths of over 5,000 Tutsi civilians at Shangi and Mibilizi parishes on 29 and 30 April 1994, respectively.

The Appeals Chamber dismissed all appeals in their entirety. The Chamber affirmed his sentence of 25 years and stated that the sentence was subject to credit being given for the period he has already spent in detention since his arrest on 5 May 2004. The Prosecution's appeal was dismissed in its entirety.

Extraordinary Chambers in the Courts of Cambodia

Contributed by: Kirsty Sutherland, Legal Intern, Defence Support Section

ECCC Internal Rule 89ter.

Severance

When the interest of justice so requires, the Trial Chamber may at any stage order the separation of proceedings in relation to one or several accused and concerning part or the entirety of the charges contained in an Indictment. The cases as separated shall be tried and adjudicated in such order as the Trial Chamber deems appropriate.

Case 002 – Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith

Severance

In both April and June 2011, the Trial Chamber indicated that it intended to commence the substantive hearing in Case 002 in the following order:

A) The structure of Democratic Kampuchea;

B) Roles of each Accused during the period prior to the establishment of Democratic Kampuchea, including when these roles were assigned;

C) Roles of each Accused in the Democratic Kampuchea government, their assigned responsibilities, the extent of their authority and the lines of communication throughout the temporal period with which the ECCC is concerned; an

D) Policies of Democratic Kampuchea on the issues raised in the Indictment.

However, on 22 September 2011, the Trial Chamber ordered the separation of proceedings pursuant to Internal Rule 89*ter*, which provides that the Trial Chamber may order the separation of proceedings 'when the interest of justice so requires'. The Chamber justified its decision on the belief that the separation of proceedings will enable it to issue a verdict after a shorter trial, thereby safeguarding the interest of victims in achieving meaningful and timely justice and upholding the rights of the Accused to an expeditious trial.

Having determined the separation of proceedings to be in the interests of justice, the Chamber limited the first trial to:

A) The issues identified above;

B) Factual allegations described in the indictment as population movement phases 1 [from Phnom Penh] and 2 [from the Central, Southwest, West and East zones]; and

C) Crimes against humanity including murder, extermination, persecution (except on religious grounds), forced transfer and enforced disappearances (insofar as they pertain to t he movement of population phases 1 and 2).

Consideration of facts relevant to population movement phase 3 will be reserved for later trial. Further, all allegations of genocide, persecution on religious grounds as a crime against humanity and Grave Breaches of the Geneva Conventions of 1949 have also been deferred to later proceedings.

Ieng Thirith

While fully supporting the need for severance, the Co-Prosecutors on 3 October 2011 requested reconsideration of the terms of the Severance Order. They argued that due to their advanced age, it is unlikely that the Accused will face more than one trial, and it is therefore extremely important that the first trial be adequately representative of the indictment.

It was submitted that if the Order stands, the trial will consider criminal acts arising from only one of the five core criminal responsibilities that formed part of the alleged joint criminal enterprise in which the Accused are purported to have participated, and that 'focusing on the first two phases of forced movements in isolation would not create an accurate historical record of the alleged commission of crimes during the Democratic Kampuchea period and would therefore not significantly advance national reconciliation'. The Co-Prosecutors further argued that the proposed division of the trial would hinder effective management of witness testimony since the same witnesses (some of whom are themselves of advanced age) would have to give testimony more than once.

The Co-Prosecutors consequently proposed an alternative severance, in which the first trial would include:

A) The phase 1 forced movement from Phnom Penh and ensuing executions of Lon Nol officials or soldiers and class enemies in District 12 and Tuol Po Chrey;

B) The S-21 Security Centre, including the purges of cadres from the new North, Central (old North) and East Zones sent to S-21, but excluding the Prey Sar Worksite;

C) The North Zone, Kraing Ta Chan and Au Kanseng Security Centres and;

D) The Kampong Chhnang Airport Construction Site and Tram Kok Cooperatives.

The Co-Prosecutors argued that such severance would not unduly lengthen the first trial, and that time needed to hear additional witnesses would be reasonable and warranted. They also argued that the Phase 2 forced movement should not be included in the first trial since it resulted from difference policy decisions from Phase 1 and would more efficiently be tried in conjunction with relevant forced labour sites. The Co-Prosecutors submitted that their proposed crime sites would provide a sufficiently representative crime base to support consideration of the Phase 1 issues, while significantly narrowing the scope of the trial by severing 18 of the 27 crime sites or events identified in the Closing Order.

Ieng Sary

The Ieng Sary Defence Team filed its conditional support for the Co-Prosecutors' submission "that a legitimate basis exists for the Trial Chamber to reconsider the terms of [the] Order and to allow for an oral hearing". The Ieng Sary Team requested that, in the event the Co-Prosecutors' request is granted, the parties be afforded sufficient time to examine and respond to the Co-Prosecutors' recommendations. It also argued that any hearing should be public since no confidential material would be discussed and a fully transparent hearing would both assist the Cambodian public in understanding the matters at hand and strengthen confidence in the ECCC.

Ieng Thirith graduated from the Lycée Sisowath in Phnom Penh then went to study in Paris, where she majored in Shakespeare studies at the Sorbonne. She became the first Cambodian to receive a degree in English Literature. Returning to Cambodia in 1957, she worked as a professor before founding a private English school in 1960. On 9 October 1975, at a meeting of the CPK Standing Committee, Ieng Thirith was allegedly appointed Minister of Social Affairs in Democratic Kampuchea. She allegedly remained with the Khmer Rouge until her husband Ieng Sary was granted a Royal amnesty and pardon in 1998. Thereafter, they lived together in Phnom Penh until being placed in pre-trial detention by the ECCC in November 2007.

Blog Updates

- Diane Marie Amann, **Justice(s) & capital punishment,** 22 September 2011, available at: http://intlawgrrls.blogspot.com/2011/09/justices-capital-punishment.html
- Alexandra Huneeus, **Courts resisting courts**, 21 September 2011, available at: http://intlawgrrls.blogspot.com/2011/09/courts-resisting-courts.html
- Dov Jacobs, **The ICC should resist its "Boy Scout Mentality" in relation to Vatican "Crimes against Humanity" for child abuse,** 15 September 2011, available at: http://dovjacobs.blogspot.com/2011/09/icc-should-resist-its-boy-scout.html
- Paul Scrom, **Corporate Liability in U.S. Courts for Human Rights Violations: Legal and Normative Split,** 2 September 2011, available at: http://www.thehumanrightsblog.com/?p=1126
- Sari Bashi, **Defining Palestinian Statehood,** 26 September 2011, available at: http://intlawgrrls.blogspot.com/2011/09/defining-palestinian-statehood.html
- Antoine Buyse, **M.S.S. Judgment Echoes in Luxemburg,** 26 September, 2011, available at: http://echrblog.blogspot.com/2011/09/mss-judgment-echoes-in-luxemburg.html

Fatmir Limaj under house arrest

On the 22 September, an EULEX pre-trial judge at the District Court of Priština ordered a month long house detention and the temporary confiscation of travel documents for Fatmir Limaj. This has occurred as a result of the indictment charging Limaj with various counts of war crimes allegedly committed in 1999 at an improvised detention centre located in the village of Klečka, Kosovo.

Publications

Books

Judith Armatta, 2010, Twilight of Impunity: The War Crime Trials of Slobodan Milosevic, Duke University Press.

Jelena Subotic, 2009, Hijacked Justice: Dealing with the Past in the Balkans, Cornell University Press.

James Crawford, Alain Pellet and Simon Olleson (eds.) 2010, The Law of International Responsibility, Oxford University Press.

Gideon Boas, James L. Bischoff, Natalie L. Reid, 2009, Elements of Crimes under International law, Cambridge University Press.

Articles

Noah Weisbord and Matthew A. Smith, 2011, The Reason Behind the Rules: From Description to Normativity in International Criminal Procedure, *North Carolina Journal of International Law and Commercial Regulation,* 36: 2, pp. 255-275

Jennifer Lincoln, 2010-2011, Nullum Crimen Sine Lege in International Criminal Tribunal Jurisprudence: The Problem of the Residual Category of Crime, *Eyes on the ICC*, 7: 2010-2011, pp. 137-155

Michele Caianiello, 2011, Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models, *North Carolina Journal of International Law and Commercial Regulation,* 36: Winter 2011, pp. 287- 318

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WE'RE ON THE WEB!

WWW.ADCICTY.ORG

Call for papers

The Hague Yearbook of International Law : 2011

Deadline: 31 October 2011

All submissions should be emailed to the Editorial Board: hagueyearbook@gmail.com

More info: http://hagueyearbook.weebly.com/call-for-papers.html

Upcoming Events

Protection of the Environment in Armed Conflict: Testing the Adequacy of International Law

Date: 7 November 2011

Time: 10:15 - 17:15

Organiser: T.M.C. Asser Instituut

Venue: T.M.C. Asser Instituut, R.J. Schimmelpennincklaan 20 -22, The Hague

Shabtai Rosenne Memorial Lecture

Date: 24 November 2011

Time: 17:00 - 19:00

Venue: Academy Hall, Peace Palace, The Hague

Organiser: Brill, with support from the Israeli Ministry of Foreign Affairs, the Israeli Embassy in The Hague.

Venue: Academy Hall, Peace Palace, Carnegieplein 2, The Hague

Opportunities

Section Head/Senior Adviser (P-5), The Hague, The Netherlands
High Commissioner on National Minorities
Closing Date: 10/10/2011

Translator, BCS (P3), The Hague, The Netherlands
International Criminal Tribunal for the Former Yugoslavia
Closing date: 16/10/2011

Defence Office Investigator (P3), Leidschendam, The Netherlands
Special Tribunal for Lebanon
Closing date: 31/12/2011

Defence Office Legal Officer (P3), Leidschendam, The Netherlands
Special Tribunal for Lebanon
Closing date: 31/12/2011