ADC NEWSLETTER
ISSUE 90
31 August 2015

**Head of Office:** Isabel Düsterhöft
**Assistants:** Isabel Maria Meyer-Landrut and Ingrid Tarlageanu
**Contributors:** Zachary Barnett, Mikaela Burch, Carlos Correa, Gordon Connor McBain, Fabio Maurer, Kirsten Storey, Danielle Topalsky, Ivana Zečević
**Design:** Sabrina Sharma



## ICTY CASES

### *Cases at Trial*

**Hadžić (IT-04-75)**

**Karadžić (IT-95-5/18-I)**

**Mladić (IT-09-92)**

**Šešelj (IT-03-67)**

### *Cases on Appeal*

**Prlić *et al.* (IT-04-74)**

**Stanišić & Simatović (IT-03-69)**

**Stanišić & Župljanin (IT-08-91)**

## ADC-ICTY Recognised as MICT Association

On 24 August, the Registrar of the Mechanism for International Criminal Tribunals (MICT) officially recognised the ADC-ICTY as an Association of Counsel Practising Before the MICT, pursuant to Rule 42 of the MICT Rules of Procedure and Evidence. The ADC-ICTY was initially provisionally recognised in December 2012 and has ever since been functioning as the *de facto* Association for the MICT.

Further information about how to apply for list of Counsel for the ICTY or the MICT can be found here: *http://tinyurl.com/qa46sco*.

## ICTY News

### Prosecutor v. Mladić (IT-09-92)

On 10 August, Dragić Gojković, demolitions expert, gave testimony before the Tribunal disputing claims that the Army of Republika Srpska (VRS) destroyed symbolic religious and historical buildings in Bosnia and Herzegovina (BiH). Gojković is a demobilised VRS engineer and Colonel from Pec, Kosovo. His report included the tasks of the VRS engineer corps and concluded that units under Mladić's command were not responsible for the, demolished buildings in non-combat areas. Gojković drafted his report based on the findings of Prosecution expert, Andras Riedlmayer and VRS engineers. Nevertheless, the witness found Riedlmayer's report to be incomplete, excluding the construction material of the buildings. The witness explained that the VRS engineers were trained to demolish buildings responsibly and with extensive documentation. Moreover, Gojković testified that the buildings were destroyed unprofessionally by "groups of

*Dragić Gojković*

## ICTY AND MICT NEWS

- ADC-ICTY Recognised as MICT Association
- Mladić: Defence Case Continues
- Hadzić: Hearing of Medical Expert
- M. Lukić: Dissenting Opinion of Judge Antonetti
- Kamuhanda: Prosecution Response to Request for Leave to Appear as *Amicus Curiae*

## Also in this issue

Looking Back……..…...4

News from the Region…....6

Defence Rostrum…….....7

Blog Updates & Online Lectures……..……..…11

Publications & Articles…11

Upcoming Events ……..…12

Opportunities ……..…12

vandals", supporting the position that the VRS is not culpable for the demolition of mosques and symbolic buildings.

On 12 August, Bosiljka Mladić, Ratko Mladić's wife, testified before the Tribunal. Bosiljka Mladić gave evidence that her husband was at home in Belgrade from the evening of 14 July 1995 until 17 July 1995 , providing the Accused with an alibi for the events in Srebrenica.


*Bosiljka Mladić*

Bosiljka Mladić stated that after her husband returned home they spent the days together, although he attended some meetings. The witness and her husband attended a wedding on 16 July where they performed the roles of the best man and matron of honour. The witness stated that she did not see Mladić use any communications equipment during the days while he was in Belgrade and therefore, he could not issue any orders during that time. The witness stated that when she found out about his indictment she directly asked her husband if he had ordered any executions in Srebrenica and he "...got serious, gave me a sharp look and asked me if I doubted his word".

From 12 to 18 August, Mile Došenović, a Defence radio-communications expert, testified before the Court. His evidence primarily concerned the communications network of the VRS during the war and the viability of alleged intercepts of this network by the BiH. Legal Consultant Dragan Ivetić conducted the direct-examination and Peter McCloskey conducted the cross-examination. Došenović was initially questioned on how he came to acquire his expertise. This was followed by continuing questions on the report prepared by Došenović, particularly his analysis of the systems available to both the VRS and BiH at the time and the impact of these on the veracity of Prosecution evidence.

The essence of both the direct-examination and cross-examination focused on the technology used to intercept communications within the VRS Main Staff, specifically why higher frequency interception devices were used to intercept lower frequency networks. Later questions were framed around this topic and whether such interceptions were actually able to be conducted by Croat and BiH forces as well as what other possible explanations there could be for the existence of the relevant intercepts if they are to be considered genuine.

On 19 August, Gojko Drašković, a former member of the VRS, spoke of his experiences as a Platoon Commander in and around Ozrenska Street during the battle for Sarajevo. He spoke about of being under the constant fear of being attacked by the snipers of the Army of the Republic of Bosnia and Herzegovina (ABiH), also because the attacks they faced from mortars mounted on to vehicles. His platoon would retaliate to these attacks, Drašković said, but would never target civilians.

On 19 and 20 August, husband and wife Žarko and Biljana Stojković described to the Court the day of their wedding on 16 July 1995. On their wedding day, they both claimed, Mladić and his wife had been in Belgrade, acting as their best man and matron of honour. Significantly, this appears to provide Mladić with an alibi in relation to his alleged presence in Srebrenica on that same day. Biljana Stojković described how Mladić and his wife had been with them in Belgrade for almost the entire day, without leaving her sight or using any communications devices. Zarko Stojković explained that, whilst there had been photographic evidence of Mladić's presence at the wedding, this had been stolen from his mother-in-law's home some years before.

Svetlana Radovanović, an expert in demography, testified on 24 and 25 August in regards to a new type of science for conducting demographic research in Srebrenica as applied by various academics including Helge Brunborg and Ewa Tabeau. Radovanović criticised this science in many respects, primarily in its efforts towards misrepresentation of populations and flawed methodology.

The key question for Radovanović is the reliability of results obtained, which can only be gained by a thorough elaboration of the reasoning behind why a particular methodology was used. Within several reports authored by Brunborg and Tabeau, there was no attempt at explaining the methodology used. Radovanović even pointed out that their report titled "Demography of Armed Conflict" included four additional areas of BiH which are areas which have enlarged the area of Srebrenica. Such an explanation for why these particular areas were used would have made the methodology more just.

Moreover, the authors never provide a correct assessment of the data. Regardless of the shortcomings in this report, the authors maintain that the results are reliable. In the end, Radovanović stated that it is important for the Court to understand the methodology used in such reports in order to see the truth behind results.

### Prosecutor v. Hadžić (IT-04-76)


*Pol Specenier*

On 21 August 2015, a hearing was held in the Hadžić proceedings to allow the parties to examine the Tribunal-appointed expert neuro-oncologist, Dr. Pol Specenier, on the contents of his expert medical report. Specenier had been appointed by order of the Trial Chamber to conduct an examination of Goran Hadžić and answer questions pertaining to Hadžić's illness and cognitive functioning.

During the examination, Specenier confirmed that Hadžić's brain tumour had progressed despite treatment, that no real medical data existed to show that further treatment would improve his survival, and that his condition could be expected to worsen from week to week.

Specenier's testimony and medical report will be considered by the Trial Chamber in conjunction with the evidence of the Tribunal-appointed expert neuro-psychologist, Dr. Martell testified in the proceedings on 29 July 2015.

The Prosecution and Defence have been directed to file their written submissions on the testimony of the medical experts.

## MICT News

### Prosecutor v. M. Lukić (MICT-13-52)

On 20 July, Judge Jean-Claude Antonetti issued a brief outline of his yet to be filed Dissenting Opinion regarding the decision of the Chamber's majority to reject Milan Lukić's Request for Review. In the abstract delivered, he mentioned that he did not take part in the final decision rendered on 7 July and his wish to review the written proceedings regarding Lukić's presence at the crime scenes.

He noted that he would be addressing eleven points in his Dissenting Opinion, 1) the compatibility of Rule 146 of the RPE with the Statute; 2) the presence of a judge who has already ruled; 3) "the new fact"; 4) the scope of authority of the review panel; 5) the guilty verdict issued against the Accused; 6) the prosecution witness; 7) the alibi witness; 8) exhibit 1D00025; 9) the weight of the testimony; 10) annex 7 of the review submissions and finally, 11) the pre-review proceedings.

Following Judge Antonetti's overview of the yet to be filed Dissenting Opinion, the Defence filed a Notice of Appeal in accordance with Article 23 of the MICT Statute and Rule 133 of the MICT Rules of Procedure and Evidence on 6 August.

**MICT Statute**

***Article 23***

1. The Appeals Chamber shall hear appeals from convicted persons or from the Prosecutor on the following grounds: (a) an error on a question of law invalidating the decision; or (b) an error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Single Judge or Trial Chamber.

The ground for appeal concerned the definition of a 'new fact' and the Chamber's misapprehension of it. According to the Appeals Chamber, it did not include the Drina River incident, the Pionirska Street incident, the Bikavac incident and the to Varda Factory incident and hence should not be subject to review.

The Defence, however, submitted that the Chamber erred in its finding and relied on the Court's case law to demonstrate that the mere fact that a material was considered in the previous proceedings should not constitute enough ground not to consider it a 'new fact' for the purpose of Rule 146. Lukić's Counsel asserted that a refusal of the Appeals Chamber to overturn its decision for a Review Application would lead to a fundamental mistake of law especially when

it might potentially demonstrate the innocence of the Applicant, the fact that he did not take part in the three incidents.

The full Dissenting Opinion has not yet been filed and the Defence has sought a relief to file an Appeal within 75 days of the date on which the dissenting opinion will be issued.

### Prosecutor v. Kamuhanda (MICT-13-33)

On 3 August, the Prosecutor in the case against Jean de Dieu Kamuhanda issued an objecting response to the two Motions submitted by the Association des Avocats de la Défense (ADAD) and the ADC-ICTY for leave to be heard as *amici curiae*. The two submissions were filed on 14 and 23 July respectively. The Prosecutor's reply was that the two files should be dismissed for not satisfying the required standard pursuant to Rule 83 of the MICT Rules of Procedure and Evidence.

Firstly, according to the Prosecutor's submission, neither the ADAD nor the ADC-ICTY has outlined any specific legal basis for its declaration and more specifically to the issue of protection orders for witnesses. This argument was rejected as the protective measures for witnesses are provided on a case-by-case basis and consequently there is no pre-established jurisdiction to affect ICTY or ICTR's cases.

The Prosecutor also criticised the fact that the Applicants have raised questions about the hurdles the Defence Counsel has encountered for having the protective measures in place. This, according to the Prosecutor, is a question of fact and not one of law and therefore it exceeds the limit imposed for an *amicus*.

Secondly, the Prosecutor asserted that the proposed amici interventions do not bring any added legal value to the determination of the case. In respect of the submission made by the ADC-ICTY regarding its participation as *amicus*, the Prosecutor contended that the three cited cases were to be distinguished from the one at issue and hence its application should be rejected.

However, on 13 August, Judge Vagn Joensen handed over the decision to grant leave to the ADAD and the ADC-ICTY to file *amicus* briefs in the case against Kamuhanda. In his reasoning, Judge Joensen explained that the issue of establishing a regime for contacting protected witnesses in post-conviction cases before the MICT that could apply globally is not a matter that falls within his jurisdictional powers. However, matters linked with the modalities of interviewing Prosecution witnesses by the Defence Counsel, whether or not a Defence Counsel requires permission from a Judge to access a witness or whether the consultation of a witness should be conducted by the Prosecution or by WISP, are matters which have a general application. Also, the fact that there is no pre-established jurisprudence dealing with post-conviction cases, Kamuhanda's main request might influence other similar requests. Therefore, allowing the ADAD and ADC-ICTY to submit *amicus* briefs might constitute a significant contribution.

The two *amicus* briefs are to be filed by 11 September.

## LOOKING BACK...

### Extraordinary Chambers in the Courts of Cambodia

**Five years ago…**

On 30 August 2010, the Co-Investigating Judges released the first decision on admissibility of civil parties in Case No. 002. The ECCC received 3988 applications to join Case No. 002 and the Judges conducted a careful assessment of each of the applications and more than 2500 elements of supplementary information. To become part of the proceedings the victims must show that they have suffered personal injury directly connected to one of the specific facts that is under investigation.

The ECCC is the first interantionalised court which provides an active role of victims as Civil Parties to criminal proceedings. The Judges organised common legal representation to ensure that each Civil Party has a lawyer and may exercise their appellate rights effectively.

## International Criminal Tribunal for Rwanda

**Ten years ago…**

On 18 August 2005, Michel Bagaragaza was transferred to the Detention Unit in The Hague for temporary detention, pursuant to Rule 64 of the Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal. He surrendered to the ICTR on 16 August, pleading not guilty to the genocide charges brought against him. Bagaragaza was transferred to The Hague due to security concerns with regard to his voluntary surrender. He was the Director General of the office controlling the Rwandan tea industry during the 1994 genocide and was sentenced to 8 years imprisonment in 2009.

## International Criminal Tribunal for the Former Yugoslavia

**Fifteen years ago…**

Tihomir Blaškić held the rank of Colonel in the Croatian Defence Council (HVO). After having been indicted in 1995, he surrendered voluntarily in April 1996. He was sentenced in First Instance to 45 years of imprisonment in 2000 in relation to various crimes against the Bosnian Muslim population in central Bosnia and Herzegovina. On 29 July 2004 ,the Appeals Chamber reversed many of the Trial Chamber's convictions and reduced the sentence to nine years. With time in detention credited, he was released early before transfer to an enforcement state on 2 August 2004.


*Tihomir Blaškić*

At the time of his surrender in early 1996, Blaškić was the highest ranked Accused to be detained by order of the Tribunal. For reasons including his rank, the voluntary nature of his surrender as well as financial means available to the Accused, a decision by then President of the Tribunal, Judge Antonio Cassese, granted Blaškić modified conditions of detention under Rule 64. The decision distinguished three types of detention: apart from detention at the Detention Unit, house arrest and safe house detention. House arrest as the form of detention with the widest degree of liberty was denied for reasons of safety, but he was granted safe house detention in a residence outside the Detention Unit instead. Meetings and visits with family and Counsel taking place at the Detention Unit. Not surprisingly, the situation was neither satisfactory to the Accused, who nonetheless soon applied for provisional release, nor to the Tribunal. It was later revoked and Blaškić remained the only Accused where any forms of house arrest were granted.

## International Criminal Tribunal for the Former Yugoslavia

**Twenty years ago…**

Duško Tadić was arrested in Germany on 12 February 1994 where proceedings were subsequently initiated against him before the competent German domestic Court. On 24 April 1995, he was transferred to The Hague becoming the first detained person at the UN Detention Unit. He was sentenced to 20 years' imprisonment on 14 July 1997, a sentence which was upheld by Appeals Chamber in its Sentencing Judgment on 26 January 2000.


*Duško Tadić*

The Tadić case is most famous for the landmark decision delivered by the ICTY Appeals Chamber in its interlocutory appeal on jurisdiction. In this decision, the Appeals Chamber made several important findings, among others, that the ICTY was established in a legally valid manner; that the nature of the conflicts in the former Yugoslavia was both international and non-international with the concept of war crimes applying to both; and that large parts of customary international law applies in such conflicts regardless of prior codified law. As a point of critique, it was widely raised that due to his low rank Tadić should have been tried before domestic Courts as opposed to the ICTY.

# NEWS FROM THE REGION

## *Kosovo*

### Kosovo Parliament Approves War Crimes Tribunal

The Kosovo Parliament approved the creation of a Tribunal that will focus on war crimes committed in the late nineties during the independence war. The vote was only successful after three rounds of votes in separate sessions of the Parliament and took several weeks to be completed. Of the 120 Members of Parliament, 82 voted for the constitutional amendment that is necessary to establish the Tribunal.

The Tribunal will be composed of international judges and prosecutors. The Dutch government is waiting for an official request from Kosovo. The Parliament's approval followed as a result of diplomatic pressure from Kosovo's Western allies, the United States and the European Union.

The newly established Court will face many challenges such as witness protection and cooperation from Kosovo's institutions. Gathering evidence from the police and obtaining judicial assistance are among other responsibilities the Court will have to carry out with the help of various institutions. Due to the small size of Kosovo, witness protection will be very difficult. Relocating individuals in such a small country poses a great challenge, especially if a witness is recognised upon receiving a new identity. It is too early to tell how the state will be involved in the Court. Dutch professor, lawyer and ADC-ICTY member, Geert-Jan Knoops was quoted in Balkan Transitional Justice saying, "without the cooperation of states and particularly the Kosovo administration itself, it will be difficult for the prosecutor and also the defence to investigate a case and - for the defence - to have a fair trial". The final details and agreements for this Tribunal are a work in progress.

## *Serbia and Kosovo*

### Serbia to Pay Compensation to Kosovo for Human Rights Violations

The First Court in Belgrade passed two judgments requesting Serbia to pay compensation to six Albanians for human rights violations. The compensation of about RSD 125,000 to 370,000 is to be paid to Albanians for torture and unlawful detention by members of the Ministry of Interior. The six Albanian men sustained significant mental and physical injuries from daily abuse and torture. The Humanitarian Law Center (FHP) plans to file and appeal against the ruling due to the amount of compensation given to the victims. The Non-Governmental Organisation believes the amount of money awarded is not proportionate to the crimes committed.

## *Serbia*

### Oliver Ivanović's Hunger Strike

A Serbian politician from northern Kosovo was taken to the hospital where he continues his hunger strike which began on 7 August. Oliver Ivanović, the Head of Civil Initiative of the Social Democratic Party in Serbia, is standing trial for charges of war crimes and was arrested in early 2014. Ivanović is protesting The European Union Rule of Law Mission in Kosovo's (EULEX) decision to extend his custody through a hunger strike. Ivanović's lawyer explains that the Court's decision to deny his client any visitors is a violation of human rights. Due to his deteriorating health, his family, lawyers and friends are trying to convince Ivanović to end his strike, but he refuses to eat until he is released. His lawyer intends to ask the Judge to consider his client's right to see his own family while he is in the hospital.

*Oliver Ivanović*

# DEFENCE ROSTRUM

## Saif al-Islam al-Gaddafi's Death Sentence

*By Ingrid Tarlageanu*

On 28 July, the Criminal Court in Tripoli convicted to death Saif al-Islam Gaddafi, the son of the former Libyan Leader Muammar Gaddafi. The accusations included war crimes, recruitment of mercenaries, indirect co-perpetration to murder, rape and the killing of peaceful demonstrators during the Arab Spring in 2011.

The bloodshed that took place in Libya was first looked into by the International Criminal Court (ICC) Prosecutor, following a referral. As a result, Resolution 1970 (Peace and Security in Africa) was passed by the United Nations Security Council in 2011, which imposed measures to end the use of force against those taking part in the Libyan Civil War. In 2011, the Prosecutor announced the opening of the investigation and soon afterwards three arrest warrants were issued for Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi. The indictments included murder and persecution as crimes against humanity allegedly committed in Libya from 15 to 28 February 2011 by using the state apparatus.

In 2013, the ICC Pre-Trial Chamber rejected Libya's allegations regarding the admissibility of the case against Saif Al Islam Gaddafi and called upon the state to surrender the Accused to the Court.

The trial of Saif al-Islam al-Gaddafi and other several officials, ministers and diplomats started in Tripoli, Libya on 14 April 2014 and has been subject to a wide range of controversies. Various human rights groups, amongst which Human Rights Watch and Amnesty International ,and the International Criminal Court have questioned the standards of the proceedings. Amnesty International, for instance, suspected that for many of the Defendants the right to a fair trial was breached as they did not receive information about the charges or the opportunity to challenge the evidence brought against them. They have also allegedly been refused the right to access an attorney or to remain silent. Amnesty International also believes that in some instances the Accused were held sequestered in unauthorised detentions for long periods of time and accusations of ill-treatment and torture have not been duly investigated afterwards.

After Amnesty International was allowed to visit Saif al-Islam al-Gaddafi in September 2014, reports showed that he and other detainees were held in Zintan where the interrogations were conducted without the presence of a lawyer, who was assigned only after the beginning of the proceedings.

*Saif al-Islam al-Gaddafi*

According to the Organisation's investigations, the Prosecution's case was based on evidence from a considerable number of witness statements, all of which have not been crossed-examined or summoned into court. As a result, the International Bar Association (IBA) Director, Dr. Mark Ellis, asserted that the security forces arrested and interrogated several trial monitors.

On top of that, John Jones QC, Gaddafi's appointed lawyer at the ICC, criticised the way the trial was being carried out and condemned it as being illegal particularly for the fact that the Libyan Prosecution is relying on statements from the Accused obtained through torture. This was further supported by the Libyan Ministry of Justice.

Muammar Gaddafi's son, seen by most as being the highest-profile family member, was captured by the Zintan group in 2011 after his attempt to escape to Niger, one month after his father had passed away. He was tried *in absentia* and assisted in parts of the hearings before the Court through video links as the militia were not willing to allow him to take part in the trial. Gaddafi, along with several other associates was sentenced to death by firing squad and received a fine of 50,000 dinars. The Accused have a right to lodge an appeal within 60 days, in which case, this appeal must be confirmed by Libya's Supreme Court.

Part of the allegations regarding incitement to murder against Saif was a controversial television speech he gave, in which he used several aggressive words such as "rats" to condemn the acts of the rebels. The ICC has pressured Libya to hand over the Accused on the grounds that he might run the risk of not having

his right to a fair trial respected in his home country. The request has been rejected by the Zintanis group who said that they were sceptical as to the guarantee that Saif would not escape again and justice would not be carried out.

There are still doubts whether the sentence will be executed, as Gaddafi is still being detained in Zintan by militia coalition forces.

The current state of affairs in Libya is described by the government's strive to re-establish the country's political and administrative order, which has been in a great disarray ever since the death of Colonel Muammar al-Gaddafi in October 2011. Nevertheless, the ongoing conflict between islamists and nationalists is still an important issue and responsible for the failure to establish a permanent, well-organised authority in control of the country.

## Can International Law Still Provide Justice for MH17?

*By Carlos Correa and Fabio Maurer*

On 29 July, Russia in a highly controversial move used its veto power in the UN Security Council to block a draft resolution effectively preventing the creation of an International Criminal Tribunal following the downing of airliner MH17 killing 298 civilians. The overriding benefit of a Security Council created Chapter VII Tribunal would be the legal obligation of every UN member state to cooperate with the Tribunal. In the following, the remaining options provided in international law will be assessed as to their feasibility and as to its realistic chance to bring the perpetrators to justice.

### I) General Assembly of the United Nations

The creation of a Criminal Tribunal through the General Assembly (GA) would qualify as a recommendation with respect to the maintenance of international peace and security. Article 18 UN Charter requires for such recommendation a two-thirds majority of the members present and voting. Whenever, the Security Council is in deadlock and a question relating to the restoration of international peace and security is at stake, the GA can be convened without delay. Whereas it can be expected that a handful of member States will make use of their right not to vote, the equivalent of an abstention in the Security Council, any vote against such Tribunal apart from Russia would come as surprise. In brief, the challenge starts only after the ballot.

While the creation of such Tribunal through the GA is even considered the valid approach *de lege artis* (at least if the Tribunal would be UN funded) as the GA is the sole competent organ to consider and approve the UN budget, a Tribunal without Security Council (SC) approval would be comparably toothless. Only the SC acting under Chapter VII can create enforceable obligations to cooperate incumbent on every member state. Similarly, Russia could invoke the clause of non-interference in domestic jurisdiction matters contained in Article 2 (7) in the UN Charter which is only trumped by Chapter VII measures.

Despite the above mentioned, it is not meant to conclude that bringing the matter before the General GA should not be considered. It can be expected that the Kremlin would try to avoid being that prominently on the agenda before every member state of the UN, perhaps being more forthcoming on an alternative scenario.

### II) National Courts of Affected Countries

One option for the victims of MH17 to seek justice is for the perpetrators of the crime to be persecuted by the courts of one of the states with jurisdiction over the crime. In international law, a state may exercise jurisdiction over a crime under three main principles: territoriality, nationality (both active and passive) and universality.

The territoriality principle provides that states have jurisdiction over crimes committed within their territory. The nationality principle allows states to exercise jurisdiction over their nationals accused of committing crimes abroad (active nationality) or to exercise jurisdiction over crimes whose victims were nationals of that state (passive nationality). Finally, the universality principle refers to the right of states to exercise jurisdiction over serious international crimes, irrespective of where the crimes occur or the nationality of the alleged perpetrators or victims. Crimes that can attract universal jurisdiction include genocide, crimes against humanity and war crimes.

The crime took place over Ukraine's airspace; by virtue of the territoriality principle Ukraine could prosecute the alleged perpetrators for murder or man-

slaughter in their domestic courts. The majority of the victims of MH17 were from the Netherlands; others from Malaysia and Australia. Through the passive nationality principle, The Netherlands (or another affected state) could claim jurisdiction and prosecute the perpetrators for murder or manslaughter in their domestic courts. The state in which the perpetrators are nationals could also exercise jurisdiction through the active nationality principle. At the present time it is unknown who exactly the perpetrators are or their nationality, so it is not known which state(s) this would include.

Another possibility is that all states that allow for jurisdiction over the relevant international crimes in their domestic legislation, could try the Accused in their domestic courts under the universality principle. For example, The Netherlands has the International Crimes Act, which allows the Dutch courts to exercise jurisdiction over any war crimes, crimes against humanity and genocide committed abroad. In July 2014, the Dutch authorities have already commenced an investigation into the shooting down of MH17 under its International Crimes Act.

The difficulties with holding domestic criminal proceedings in Ukraine or the Netherlands would be the perceived lack of impartiality of the proceedings. Ukraine is currently engaged in conflict with Russian separatists in the East of Ukraine, whom the Ukrainian Government accuses of shooting down flight MH17. In addition, two-thirds of the victims were Dutch nationals and the Dutch Government is under immense pressure to bring the perpetrators to justice.

Arguably the biggest obstacle would be that Russia would have no legal obligation to cooperate with Dutch or Ukrainian criminal proceedings. This problem would be compounded if the perpetrators are Russian nationals. Extradition of Russian nationals is illegal under the Russian Constitution and Criminal Code. Therefore, if Russia does not wish to cooperate, there is not much that Ukraine or The Netherlands could do.

**III) International Criminal Court**

Another alternative is the International Criminal Court (ICC) exercising jurisdiction over the matter. Flight MH17 was arguably shot down in the context of an armed conflict. The conflict is *prima facie* an internal armed conflict between Ukraine and separatist, within Ukrainian territory. Alternatively, the conflict could be considered an international armed conflict if Russia had a certain level of control over the separatist.

The ICC only has material jurisdiction over the following international crimes: genocide, crimes against humanity and war crimes. The shooting down of MH17 is clearly not genocide and is extremely unlikely to be considered a crime against humanity; in all likelihood the single attack would probably lack genocidal intent nor can it be considered a widespread and systematic attack against the civilian population. The only reasonable argument is that the attack on the civilian aircraft constituted a war crime. This argument could also be problematic. Only a deliberate attack against the civilian population would constitute a war crime. William Schabas, Professor of International Law, stated that: "Targeting civilians is a war crime, but it seems right now not to be likely that the plane was deliberately targeted. If it's negligence, then its manslaughter". Under the Rome Statute, the *mens rea* for a war crime is 'knowledge'. If the Russian separatist believed that they were targeting a Ukrainian military aircraft, this mistake of fact would negate the mental element of the crime. All the information known to date suggests that the separatists believed that they were targeting a military aircraft.

Another critical issue is that neither Ukraine nor Russia are parties to the Rome Statute. The ICC does not have universal jurisdiction. The Court only has jurisdiction if: the Accused is a national of a state party, the crime took place on the territory of a state party, a state making a declaration accepting the jurisdiction of the Court or the UN Security Council refers the situation to the Court. The Ukrainian government has lodged a declaration accepting the ICC's jurisdiction in the past. The declaration's temporal scope only included the dates from 21 November 2013 to 22 February 2014, when Ukraine's former president Victor Yanukovych was ousted amid political unrest. Declarations can be made retrospectively and Ukraine could again make a declaration which covers the shooting down of MH17.

Furthermore, assuming that the shooting down of MH17 falls within the jurisdiction of the ICC, and that the perpetrators are identified and arrested, due to the complementarity principle the ICC can only trial the individuals where states that also have jurisdiction are not willing or capable to investigate and prosecute. As the Netherlands are currently investigating the shooting down of MH17, it is unlikely that this situation will ever reach the ICC.

### IV) International Court of Justice

Russia, Ukraine, Malaysia or the Netherlands are as UN Member States also Members of the International Court of Justice (ICJ). The jurisdiction of the ICJ comprises *inter alia* questions of international law as well as breaches of international obligations. However, the Court is bound by principles of state sovereignty. Not only can it not investigate a case *proprio motu*, it furthermore requires that both the intervening and the responding State need to accept its jurisdiction. As Russia would very unlikely recognise the jurisdiction, this path must be considered of limited practical relevance.

### V) European Court of Human Rights

Both Russia and Ukraine are state parties to the Council of Europe and have ratified the European Convention on Human Rights (ECHR). The Strasbourg Court is both competent to hear individual complaints in relation to violation(s) of rights protected under the Convention occurring on ECHR territory as well as to decide on inter-state complaints.

The preliminary question concerning individual complaints will be whether the complaint is to be addressed to Ukraine or to Russia. Jurisdiction according to the Court's jurisprudence is primarily territorial, but the Court has recognised that in situations where another state exercises effective control over a (part of a) Convention State, the ECHR obligations of the state in control transfer to the respective territory. Such dictum was notably made in the *Ilascu case* in relation to Russia exerting effective control over Transnistria, despite the latter formally being part of Moldova. While in this case or in cases where a ECHR State acts as occupation power (Iraq, Afghanistan) this is relatively straight-forward, the Human Rights Court will have a difficult task to establish precisely this question. Not having its own investigators or officers, the Court relies on Member state cooperation. Yet, it is expected to decide on the crux of the dispute, i.e. whether Russia exercised effective control over the territory. Despite this fact, Russia seems for some time already on the verge of abandoning its ties with the Strasbourg organ. Most importantly, the Court by way of its functioning as a supervisory organ in human rights matters can under no circumstance issue indictments or secure criminal convictions. What it can do, however, is to award financial compensations for the bereaved. To date, at least one complaint has been lodged against Ukraine before the Court alleging an Article 2 ECHR (Right to Life) violation of Ukraine for not properly securing its airspace.

Inter-state complaints before the ECtHR are scarce in nature. This is mainly owed to the fact that the European Union offers other channels for disputes between its member states. Since 1990, only six inter-state complaints were lodged. Apart from two complaints against Turkey, the remainder was lodged against Russia in connection with the Georgian crisis 2008 and the more recent Crimea situation. The speed with which the Court reacted to the Ukraine crisis is to be seen as indication of its willingness to play an active role. Nonetheless, it remains questionable how another condemnation of Russia would achieve what for instance painful EU sanctions have yet failed to do, namely secure Russia's cooperation in the investigations; Not to mention bringing the perpetrators of the downing of MH17 to justice.

### Conclusion

In theory many alternatives seem to exist to a Tribunal created by the UN Security Council. In practice, if the primary goal is bringing to justice nationals covered by a powerful state not cooperative few effective alternatives thereto exist.

# BLOG UPDATES AND ONLINE LECTURES

## Blog Updates

Tibor Bajnovič, **"ECCC: Ieng Thirith Dies at 83"**, 24 August 2015, available at: http://tinyurl.com/pkoh9f3

Auriane Botte, **"Emerging Voices: Is the International Community Ready for a "Duty to End Impunity?"**, 25 August 2015, available at: http://tinyurl.com/ntvlvoz

Kevin Jon Heller, **"The Post-Incarceration Life of International Criminals"**, 27 August 2015, available at: http://tinyurl.com/pe2zsrv

## Online Lectures and Videos

**"Human Rights and Law"**, by The Open University, continuously available at: http://tinyurl.com/nv35smy

**Hersch Lauterpacht Memorial Lectures 2013-2014: "International Law and the Art of Peace. Part III: Attracting Law Compliance"**, by Professor Mary Ellen O'Connell, Cambridge University, February 2014, available at: http://tinyurl.com/ntwqu7u

**"International Human Rights Law: Prospects and Challenges"**, by Duke University via Coursera, October - December 2015, available at: http://tinyurl.com/nop5sw8

# PUBLICATIONS AND ARTICLES

## Books

Marco Odello & Francesco Seatzu (2015), **Latin American and Caribbean International Institutional Law**, T.M.C. Asser Press.

Joop Voetelink (2015), **Status of Forces: Criminal Jurisdiction over Military Personnel Abroad**, Springer.

Sosteness Francis Materu (2015), **The Post-Election Violence in Kenya—Domestic and International Responses—International Criminal Justice Series**, T.M.C. Asser Press.

Nicola Palma (2015), **Courts in Conflict: Interpreting the Layers of Justice in Post-Genocide Rwanda**, Oxford University Press.

## Articles

Marlies Glasius (2015). **"'It Sends a Message': Liberian Opinion Leaders' Responses to the Trial of Charles Taylor"**, *Journal of International Criminal Justice*, Volume 13, Issue 3.

Ignacio de la Rasilla de Moral (2015). **"The Shifting Origins of International Law"**, *Leiden Journal of International Law*, Volume 28, Issue 3.

Rosa Freedman and Nicolas Lemay-Hebert (2015). "**Human Rights in Customary Law"**, *Leiden Journal of International Law*, Volume 28, Issue 3.

# CALL FOR PAPERS

**The Institute of Advanced Legal Studies, University of London** has issued a call for papers for its conference on "Undesirable and Unreturnable? Policy Challenges Around Excluded Asylum-Seekers and Other Migrants Suspected of Serious Criminality But who Cannot be Removed".

Deadline: 5 October 2015 More Info: http://tinyurl.com/pzddd9m

**The Utrecht Journal of International and European Law** has issued a call for papers for its upcoming special issue on "Intellectual Property in International and European Law".

Deadline: 15 October 2015 More Info: http://tinyurl.com/o8qk89d

**The International Journal of Human Rights and Constitutional Studies** has issued an open call for papers on "Human Rights Protection, Human Rights Public Policies, Democracy and Governance".

Deadline: ongoing More Info: http://tinyurl.com/oxk3703

HEAD OFFICE

ADC-ICTY

ADC-ICTY
Churchillplein 1
2517 JW The Hague
Room 085/087

Phone: +31-70-512-5418
Fax: +31-70-512-5718

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

WWW.ADC-ICTY.ORG


**ADC-ICTY**

**Affiliate Membership**

**For more info visit:**

*http://adc-icty.org/home/membership/index.html*

**or email:**

*iduesterhoeft@icty.org*

# EVENTS

In Whose Name? On the Functions, Authority and Legitimacy of International Adjudication
Date: 7-8 September 2015
Location: Asser Institute, The Hague
More info: http://tinyurl.com/padwnl5

"Crimes before the ICTY: Central Bosnia" - Premiere of a Documentary
Date: 9 September 2015
Location: The Hague
More Info: http://tinyurl.com/nabb52k

From Ratification to Action: The Importance of Full Implementation of the Rome Statue
Date: 16 September 2015
Location: The Hague
More Info: http://tinyurl.com/nabb52k

# OPPORTUNITIES

Legal Assistant, The Hague
Legal Affairs and Compliance, Netherlands Development Finance Company (FMO)
Closing Date: 31 August 2015

Legal Officer (P-4), New York
Department of Political Affairs, United Nations
Closing Date: 2 September 2015

Associate Legal Officer (P-2), New York
Office of Legal Affairs, United Nations
Closing Date: 3 September 2015

Legal Counsel, The Hague
Permanent Court of Arbitration
Closing Date: ongoing


*The ADC-ICTY would like to express its sincere appreciation and gratitude to Zachary Barnett, Carlos Correa, Claire Legwinski, Gordon Connor McBain and Ivana Zečević for their contribution to the Newsletter and ADC Head Office Intern Ingrid Tarlageanu for her excellent work and commitment to the Association. Ingrid has been in charge of the Newsletter and contributed to many projects. Her support and assistance were invaluable. We wish all of them the best for the future, they will be missed!*