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Head of Office: Isabel Düsterhöft
Assistants: Benjamin Schaefer and Fábio Kanagaratnam
Contributors: Sunna Ævarsdóttir, Adam Harnischfeger, Molly Martin, Garrett Mulrain, Philipp Müller, Yoanna Rozeva, Jérôme Temme and Bas Volkers.
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

Popović *et al.* (IT-05-88)

Prlić *et al.* (IT-04-74)

Stanišić & Simatović (IT-03-69)

Stanišić & Župljanin (IT-08-91)

Tolimir (IT-05-88/2)

ICC *Re*VISION PROJECT

Memorandum by the OPCD

The following internal memorandum was sent by the Office of Public Counsel for the Defence (OPCD) to all Defence Counsel at the International Criminal Court (ICC). The memorandum is in response to a Town Hall meeting wherein the ICC's Registry has proposed to restructure the OPCD. The ADC-ICTY has been provided with a copy of this memorandum by ICC Defence Counsel.

Registrar's *Re*Vision Project 24 July 2014

Some of you have contacted us about the Registry's *Re*Vision proposals and the impact it may have on the work of the Defence. At this time, the project is undergoing further steps by the *Re*Vision team, and we would encourage you to contact them with any questions as to the proposals or progress.

Following the Town Hall meeting last Friday, the OPCD has taken time to reflect upon the Registrar's proposed structure — one Registry 'Defence Office' (a neutral support unit, abolishing an independent OPCD) coupled with an outside association to serve as the Defence 'voice' — and have identified some points of discussion for our future meetings with the *Re*Vision team. We have communicated the following OPCD position to the *Re*Vision team as a point of starting such discussions (below), but we would appreciate your input on the same. Your point of view is critical to an understanding of what will best serve the Defence teams in any new structure, and we look forward to your feedback that will help guide further dialogue.

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ICTY/MICT NEWS

- Prlić *et al.*: Notices of Appeal Filed
- Mladić: Defence Case Continues
- Hadžić: Defence Case Continues
- Stanišić & Župljanin: Appeals Chamber Decisions
- Karadžić: Decisions on Various Motions

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The Proposal of a neutral 'Defence Office'

As we understand it, the Registrar's proposal for the Defence would seek to abolish the OPCD as found in the Regulations of the Court and divide its functions in the following way:

1) Legal research and 'general assistance' as provided to the Defence teams will be taken over by a division of the 'Defence Office' (will be a neutral Registry office designated to providing legal aid, logistical support and legal advice to the Defence teams);

2) The internal Defence 'voice' within the Court will be moved out to an external association of Counsel that will be created by the Registry;

3) The function of 'duty counsel' or temporary assignments as ordered by the Chambers would be assumed by a list of duty counsel maintained by the 'Defence Office'.

Further to this proposal, we understand that there would be no 'independence' of the Defence within the structures of the Registry and the totality of Defence representation and advocacy (both individual and collective) would be made external to the Court.

The Need for an Internal Independent Office of the Defence

At the outset, and as stated in previous meetings, we must disagree with the idea of abolishing an independent Office for the Defence (presently, the OPCD), the primary reason being that an *independent* Defence Office (if not an organ or another type of unit) is imperative to some semblance of equality of arms as has developed in international criminal law.

As you are well-aware, the OPCD was a development that was created as the previous systems in international criminal law — notably those of the *ad hoc* Tribunals — were perceived as lacking in equality of arms with respect for both status and resources within the courts.[1] With particular referral to the ICTY, one author notes that "*it is essential that the previous mistakes are not repeated, by making proper provision for an equally strong defence office.*"[2] What this amounts to, is the following:

> *It has to be acknowledged that it is absolutely essential for the defence to be considered on an equal basis to the prosecution from the very start, in terms of legal capacity, administrative support, investigations, public relations, media coverage and outreach. Without this, there cannot be a fair trial.*[3]

Indeed, even in the process of drafting the Rome Statute, there were many States Parties who were arguing for an independent office of the Defence to avoid those mistakes of the *ad hoc* Tribunals and ensure internal representation of the rights of the Defence.[4]

Unfortunately it was not possible at the time of the Rome Statute to create such an Organ or Office; recognising this absence, thereafter, the Office of Public Counsel for the Defence was created and established in 2006, after the adoption of the Regulations of the Court by the ICC Judges in 2004. The creation and development of the OPCD, as mandated to the Registrar by Regulation 77 of the Regulations of the Court, was not borne out of a specific task to be fulfilled, but rather, as aptly described by the IBA in 2011:

> *[The OPCD] was established to remedy an imbalance between the prosecution and defence consistent with the principle of equality of arms by ensuring that defence teams were provided with legal assistance and support during trials. The office is also seen as the institutional voice of the defence.*[5]

[1] *See* Human Rights Watch (HRW), *Courting History: The Landmark International Criminal Court's First Years*, http://www.hrw.org/sites/default/files/reports/icc0708webwcover.pdf (last accessed 23 July 2014), p. 76: "At the International Criminal Tribunals for Rwanda and the former Yugoslavia, the defense was not created as an internal structure of the court, and defense counsel there had to work, notably through independent associations of counsel, to gain status and resources."

[2] Rupert Skilbeck, *Building the Fourth Pillar: Defence Rights at the Special Court for Sierra Leone*, Esssex Human Rights Review, Vol. 1, No. 1, p. 85.

[3] *Id.*, p. 86.

[4] *Id.*, pp. 77-78.

[5] International Bar Association (IBA), *Fairness at the International Criminal Court*, August 2011, p. 29.

After its creation, the OPCD has undergone substantial review in 2011/2012 and its mandate was reaffirmed and its duties strengthened, which gave great deference to its mandate, allowing "general assistance" to the Defence support and certain duties which are 'standby' functions as may be dictated by the Chambers and Registry. This mandate has been realised in the following ways that must be retained by an independent, internal structure of the ICC.

The need for an institutional Defence 'voice'

From its inception, the OPCD, where possible — armed with the full position of the practicing Defence teams—has served as a Defence 'voice' by transmitting the views of the practitioners to countless working groups, the CoCo, the ACLT, the HWG and the ASP. As an internal voice of the Defence, generally, and possessing the ability to represent the specific Defence teams where they have requested us to do so, has given greater efficacy to policy-making at the ICC. Armed with the viewpoints of all appearing before these Chambers has led to fruitful discussions with the potential to create less in-court litigation regarding adopted texts or policies later; the end result – more efficient proceedings. Having a Defence 'voice' within the institution — not solely external — is critical in ensuring a base level of equality of the parties appearing before the Court and is something that, as already established on this principle, should not be eradicated.

The need for independent assistance to the Defence

As early as 2004, the ICC Prosecutor had "programmes for legal advice, a separate public relations and mass media programmer, an entire appeals division to deal with the interlocutory appeals at the pre-trial stage, an analysis section, a knowledge-base section, investigations and prosecutions" as well as the ability to manage programmes "connecting with academic institutions around the world, consultations with over 120 leading international experts, creating a roster of leading experts", which has inspired the question: "when do the defence get to do the same?"[6]

While fully mindful that equality of arms does not equate to equality of resources, the OPCD's mandate of 'general assistance' has allowed it to provide an array of services to the Defence to supplement the work of the teams. Indeed, the existence of the Office is not found in our specific day-to-day tasks, but that we exist at all to provide whatever modicum of supplementary assistance we can to the Defence teams; our independence allows us to provide assistance as dictated by the Defence practitioners themselves, in an small attempt to counterbalance the numerous resources available to a Prosecution case team in its work.

The fact that OPCD staff members are bound by the provisions of confidentiality set out in the ICC Staff Rules and Regulations, as well as by the Code of Professional Conduct for Counsel, is what allows the OPCD to effectively assist the Defence teams. Their trust of the OPCD as an independent Office for all assistance — legal research, advice, technical, or otherwise — allows for free communication lending to the most efficient levels of service. It is this unique factor that creates the utility of the Office for all teams, as evidenced by the fact that we are even called upon for advice or support by those teams with resources outside of the legal aid scheme.

If the independence is removed from the functions that the OPCD is currently providing, our ability to serve will be greatly diminished, relegated only to administrative functions (as performed by CSS currently) and generalised research only going outward to the Defence. The members of the OPCD, having worked on Defence teams in international criminal courts/tribunals, know that the Defence teams would not feel secure in making requests for advice from a 'neutral' unit that is beholden to the Registrar. The Prosecution, similarly, would not utilise a neutral organ for such assistance — this is the reason that the Legal Advisory Services section of the Prosecution, as well as other specialised sections, are located directly within the Prosecution organ of the Court and not generalised services of the Registry.

[6] Skilbeck, *supra* n. 2, p. 78.

The benefit of 'in-house' standby Counsel

To date, the OPCD has only performed this function in an *ad hoc* manner, where assigned by the Chambers or the Registry to assist in the short term. The OPCD submits that this function is simply a 'plus' or added value to its primary function of being an independent Defence Office.

Upon our own reflection at the beginning of this year, we have reaffirmed that it is our own policy to take all necessary precaution in any 'assignment' so as to not create a potential conflict of interest or to take on a workload that we cannot manage. As we are a five-person Office, it is simply not possible for the personnel of the Office to represent a suspect or accused for any great amount of time or substance. Indeed, we would agree with the HRW Report that rightly pointed out that the 'public defender' model for an OPCD was rejected as not cost-effective; indeed, *"[t]he office was simply not designed to handle the onerous demands, including financial demands, associated with representing individual defendants"*.[7] As such, this role is one that is viewed by the OPCD — and effectuated as such — as a backup function to be used in urgent and brief cases, where appropriate with respect to the primary functions of the Office in serving all Defence teams.[8] The OPCD submits, then, that such consideration should be taken with any such duty entrusted to an independent Office, but such possibility does not need to be entirely abolished.

<u>The Proposal of an Association</u>

As stated in our previous meetings, the OPCD would welcome the addition of an association of counsel to play a greater function in the external voice of the Defence to the general public and specialised ICL practitioners worldwide. However, in no way does the OPCD support the creation of an association at the cost of an internal, independent voice of the Defence *inside* the ICC.

Furthermore, the creation of an association by the Registrar is not one that will be truly 'of Counsel'. The OPCD submits that, while the Registry can recognise, and potentially subsidise, an external organisation of Counsel, such a body must be created by those who will be governed by such institution.[9]

Finally, the OPCD has concerns about the ability of an external association to finance itself and would emphasise that a creation of any such body must be clearly planned with a view to funding it appropriately. For this, and all other advice necessary to the creation of an external association, the OPCD remains available for brainstorming with the relevant actors.

<u>OPCD's Proposed Alternatives</u>

In an effort to better constructively assist the *Re*Vision team in effectuating its mandate, and as requested last Thursday by [*Re*Vision], the OPCD provides the following suggested alternative ideas for managing and recognising the Defence as essential actor — a party to the proceedings—before the ICC:

1. **A Defence Organ**: The OPCD has always been of the view that a Defence Organ in the ICC is the only way to secure true equality of arms in the proceedings. The reasons for this are obvious in that it would put the Defence on equal footing with the Prosecution as parties to the proceedings while, at the same time, allow for more effective management. As aptly summarised by Ken Gallant:

> *A Defense Organ (whether or not called a Defense Office) has as its sole duty promoting of the interests of the defense. [...] This would take the Registry out of the no-win position in which it – unfairly in my view – has been put: being a neutral Organ for all parties and interests, while being asked to 'promote' the interests of the Defense. A Defence Organ does not wholly eliminate the possibility of conflicts about the Defense, but it eliminates*

[7] HRW, *supra* n. 1, p. 80.

[8] *See* WCL War Crimes Research Office (WCL), *Protecting the Rights of Future Accused During the Investigation Stage of the International Criminal Court Operations*, http://www.wcl.american.edu/warcrimes/icc/documents/WCROReportonRFAJuly2008.pdf (last accessed 23 July 2014), p. 7, suggesting that OPCD could "focus on supporting independent defense counsel and serving as a voice for the general interests of defense at the ICC, rather than engaging in the representation of potential or known accused."

[9] *See, e.g.*, ICC Rule 20(3).

> *a great deal of conflict seen in the ICTY, ICTR, and ICC between Registry and defence counsel. Most importantly it makes the overall structure of the Court much fairer.*[10]

This autonomy is not an impossible fantasy, but was realised at the Special Tribunal for Lebanon in establishing an independent Defence organ; this was highlighted by Secretary-General Kofi Annan in its establishment, stating:

> *[…]* ***the need for a defence office to protect the rights of suspects and accused has evolved in the practice of United Nations-based tribunals as part of the need to ensure 'equality of arms'****, where the prosecutor's office is an organ of the tribunal and is financed in its entirety through the budget of the tribunal. The statute of the special tribunal institutionalizes the defence office. The head of the office is appointed by the Secretary-General, although, in carrying out its functions, the office is independent. The defence office of the special tribunal is to protect the rights of the defence, draw up the list of defence counsel and provide support and assistance to defence counsel and persons entitled to such legal assistance.*[11] [Emphasis added.]

This sentiment was echoed by the much-revered Judge Antonio Cassese in his *Statement on the Adoption of the Legal Instruments Governing the Organization and the Functioning of the STL*, stating:

> *Under the Rules, suspects and accused can benefit from the assistance and expertise of an* ***independent and autonomous Defence Office****, which is placed on an equal footing with the Office of the Prosecutor.* ***The establishment, under the Statute, of a Defence Office, is aimed at ensuring equality of arms between the parties.*** *The Defence Office has extended powers, in particular to select highly qualified counsel with experience in terrorism and international criminal cases, and to ensure that they have adequate facilities and legal support for their work. He can also provide other assistance to defence counsel.*[12] [Emphasis added.]

The comments of the Secretary-General and Judge Cassese concerning the need to ensure equality of arms are directly applicable to the current governance structure of the ICC, particularly in light of the Court's obligation under article 21(3) of the Statute to ensure that the application and interpretation of the ICC Statute, Rules and Regulations is consistent with internationally recognised human rights.

While complex and requiring a long-term process to be undertaken by the Court and ASP, such amendment to the Rome Statute is, however, possible[13] and, the OPCD submits, should be considered in this critical juncture of the Court pursuant to the opportunity presented by the restructuring process.

2. **A larger OPCD (granting independence to the Registrar's proposed 'Defence Office')**: As discussed in the *Re*Vision process to date, the OPCD has been performing the mandated 'general assistance' to the Defence in a way that has been appreciated and used by the teams, just

[10] Kenneth S. Gallant, *Addressing the Democratic Deficit in International Criminal Law and Procedure: Defense Participation in Lawmaking* in The Sierra Leone Special Court and Its Legacy, ed. Jalloh (CUP, 2014) p. 584.

[11] UN Security Council, Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, U.N. Doc., S/2006/893, (Nov. 15, 2006), para. 30.

[12] *Statement on the Adoption of the Legal Instruments Governing the Organization and the Functioning of the STL,* 1 April 2009, http://www.stl-tsl.org/en/media/press-releases/statement-from-the-stl-president-judge-antonio-cassese (last accessed 22 July 2014), Sec. 2.

[13] *See* Gallant, *supra* n. 10, p. 585.

as you have recently complimented us on our valuable work. Furthermore, the OPCD has constantly reviewed its own internal processes so that it has had the ability to take on a growing number of cases and tasks that have, to date, been insufficiently met by other departments of the Registry. Given the high-functioning of the OPCD and the great capacity for efficiency realised by its independence, the OPCD should thus be given more staffing and tasks.

Such a proposal of a larger independent 'Defence Office' was recently made as a secondary option to a full Defence Organ (in fact, made in conjunction with a proposed Bar Association); this proposal:

> *[...] would be the creation of a Defence Office at the ICC, which would be on the model of that of the SCSL, along with the creation or recognition of a Bar. That is, the Defense Office would not be an independent organ, but would be guaranteed functional independence from the Registry in the performance of its defense duties. These duties would include the administration of legal aid for the Defense (today performed by the Registry) and the legal research and advice functions of the OPCD. The fact that the OPCD has been functionally independent in its research and advice function bodes well for the possibility that a larger Defence Office would be independent as well.*[14]

Thus, the OPCD would suggest that the Registrar's proposal for a 'Defence Office' could be simply the OPCD itself, taking on further duties (and staffing) of other sections, such as CSS. To the degree that certain functions are considered incompatible in an independent Defence Office, there could be other sections of the Registry where such functioning may be more appropriate. This, in turn, could benefit the development of a 'Defence Organ' as a possibility for the long-term future, if not a reality at this time.

3. **The Status Quo for the Independent Offices**: The points of the second proposed alternative equally apply here. While changes may be need to streamline other sections of the Registry, the OPCD submits that it is functioning at a high level and, as an independent office, should be allowed to remain functioning with its core duties to the benefit of Defence Counsel.[15] *All* duties of the OPCD, as noted above, require independence for the most use of such resource to the Defence; consider:

> *At the ICC, the Office of Public Counsel for the Defence, in brief, provides substantive support to all defense teams and essentially operates independently of the Registry. By contrast, the Defence Support Section, as an arm of the Registry, handles administrative tasks associated with defense representation; this includes, the management of legal aid for indigent defendants. This separation of administrative and substantive functions is advantageous for the interests of the defense and reflects an important "lesson learned" from the experience at other tribunals, like the Special Court for Sierra Leone. Since the OPCD is independent from the Registry, it is much better placed to intervene in the event that the Registry's management of the legal aid system or dealing with other defense related issues would infringe on the rights of defendants. In addition, as a practical matter, administering the payment of fees of indigent defendants' counsel can generate conflict and make relationships with counsel tense.*

[14] *Id.*, p. 585.

[15] It should be likewise considered that the OPCD has proved a 'sustainable' Office to date in that, at present, the same number of staff are assisting 19 Defence teams as assisted 4 teams in 2008.

> *Relieving the OPCD of this responsibility means that its staff can focus on substantive issues related to the defense. This also helps its staff avoid being perceived as agents of the Registry, curtailed by broader interests of the institution.*[16]

The OPCD is keenly aware that it may no longer be ideal to house such an 'independent' office under the Registry and, therefore, would assist the *Re*Vision team in seeking other forms of governance for the OPCD as it presently exists. However, an independent Office to assist the Defence *within* the Court is a minimum guarantee that should be afforded to meet the prevailing standards of equality of arms as found in international criminal law today.

Conclusion

In sum, the core purpose for the creation of the OPCD still remains and continues to be a vital component in ensuring that equality of arms before the ICC. Such need will remain in the future, with or without the benefit of an external association. Taking away the independence of a Defence Office or removing the Defence voice to external may seem like small moves, but it is actually quite significant to the overall objective of achieving fair trials and appropriate Defence representation in the Court. As stated by Judge Blattmann, "*while it may seem harmless to make small concessions which erode the rights of the accused, there can be a cumulative effect which does, in fact, put in grave jeopardy the right of the accused to a fair trial.*"[17] The OPCD submits that taking away an independent support office and institutional presence of the Defence is one of those steps that will necessarily contribute to an erosion of equality of arms — making 'the Defence' an outsider. This point — ensuring an internal institutional independent presence of the Defence — is one of such critical mass that the OPCD cannot be convinced otherwise.

Finally, the OPCD thanks you for taking the time to consider the points we have included here and hope that we will have the opportunity to meet with you and your team to discuss further in the near future. While we remain beholden to the ideal of an independent Defence Office within the ICC, we look forward to engage with your team in discussions as to how to most effectively execute the tasks necessary to supporting the present and future suspects/accused/convicted of the ICC and those who represent them. Additionally, we believe that the most important component to these discussions will be to consult the Defence practitioners before the Court and those who are on the list of Counsel, as well as the Judges and Prosecutor of the ICC, the NGO community and all those who were consulted and contributed to the creation of this Office, its revised mandate (which entered into force 29 June 2012) and its on-going development. As such, we look forward to discussions with these relevant stakeholders, as well.

[16] HRW, *supra* n. 1, p. 77.

[17] Separate and Dissenting Opinion of Judge Blattmann attached to Decision on opening and closing statements, ICC-01/04-01/06-1346, 22 May 2008, para. 3, *citing* Separate and Dissenting Opinion of Judge Blattmann attached to Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, ICC-0I/04-01/06-1131-Anx3, 24 April 2008, para. 10.

ICTY / MICT News

Prosecutor v. Prlić *et al.* (IT-04-74-A)

NOTICE OF APPEAL UPDATE

The Trial Chamber in *Prlić et al.* issued its Judgement on 29 May 2013 in French. Three teams (Praljak, Pušić and the Office of the Prosecutor) filed their Notices of Appeal right away. In an effort to avoid prejudicing teams that filed earlier, the Appeals Chamber granted motions to harmonise the briefing schedule, such that these three teams would not have to turn in their Appeals Briefs until 135 days from the issuance of the English translation of the Judgement, when the remaining four teams' Notice and Briefing timeline was triggered. The English translation was issued on 6 June of this year, and Notice from the remaining teams that had not yet filed (Prlić, Stojić, Petković and Ćorić) was due on 4 August.

PRIOR NOTICES

Counsel for Slobodan Praljak filed their Notice of Appeal on his behalf in June 2013. Praljak requested a reversal of his convictions or, alternatively, a trial *de novo*, and, in the alternative, a reduction of his sentence. Praljak presented 58 grounds of appeal, many of which included multiple sub-grounds. His grounds primarily related to the Chamber's findings on an international armed conflict and state of occupation and protected persons and combatants under international humanitarian law, the non-existence of a Joint Criminal Enterprise (JCE) and the evidence of its elements and Praljak's membership, and many legal and factual errors related to the crime sites in various municipalities.

Counsel for Berislav Pušić filed their Notice of Appeal also in June 2013. His appeal focused primarily on the Chamber's findings on JCE liability, strenuously disagreeing with the way the various elements have been applied to the *Prlić et al.* case. Specifically, Pušić argued that: there existed no JCE, he did not participate in a JCE, he was not a member of a JCE and he did not share the intent concerning the common purpose. Additionally, Pušić contests the Chamber's finding that the armed conflict was of an international nature.

The Notice of Appeal of the Office of the Prosecutor focused primarily on the fact that the Chamber failed to enter convictions on several counts. The Office of the Prosecutor alleges that the Court erred in failing to convict the Accused on the additional JCE III crimes, and additionally, in not finding the Defendants guilty for wanton destruction. The Prosecutors lastly considered the sentences imposed to be manifestly inadequate.

RECENT NOTICES

Jadranko Prlić challenged the findings related to the JCE and internationalisation of the armed conflict, though primarily focusing his defence on the evidentiary standards the Chamber erroneously applied in the Judgement. He criticises not just the Court's assessment of witness credibility and evidence of Prlić's own witnesses, but also lamented the over-reliance on Prosecution witnesses, for which the Trial Chamber allegedly failed to properly assess credibility. In general, Prlić asserts that the Trial Chamber had a clearly biased view on the facts of the case and that this confirmation bias led the Judges to disregard evidence without providing a reasoned opinion and to rely heavily on uncorroborated hearsay evidence, such as the Mladić notebooks.

Counsel for Bruno Stojić submitted 57 grounds of appeal in their Notice, many with several sub-grounds, identifying a plethora of errors of law and fact in the Trial Judgement that invalidates the Judgement and result in a miscarriage of justice. Like many of the Defence teams, Stojić denies the very existence of the JCE, the evidence underlying the Chamber's JCE findings, and their factual and legal support for finding that Stojić was a part of any such JCE, further challenging the lack of a reasoned decision for many of the impugned findings. Other main areas of appellate grounds include the Chamber's findings on Stojić's specific powers and scope of competencies, particularly related to the military and his effective command and control over the armed forces of Republic of Herzeg-Bosnia (HZ[R] HB), and the reasoning provided by the Trial Chamber for its findings and for rejecting alternative reasonable inferences. Further, there are several places where inconsistencies in the lengthy Judgement are challenged. Stojić also challenges several specific elements of JCE I and III as applied to his individual liability, including his lack of contribution, shared intent and acceptance of foreseeable risk. Finally, he challenged the sentence, based on both improper consideration of mitigating and alleged aggravating factors and improper calculation of time served credit. Stojić has requested either a reversal of all counts of conviction or, alternatively, a reduction in his sentence.

Joint Criminal Enterprise III

Multiple persons have agreed on a Joint Criminal Enterprise and one of those persons commits a crime that was a natural and foreseeable consequence of carrying out the common purpose. In order for JCE III to apply, the participant must, at least, be aware of the common objective or purpose and of the (objective) foreseeability of the commission of certain crimes.

Counsel for Milivoj Petković claimed seven overarching grounds of appeal, each encompassing many errors and stretching over the entirety of the case. Additionally, an overview is given of the "Principal Catego-

ries of Error Committed by the Trial Chamber". A few factors found within this overview are that the Trial Chamber turned legitimate military actions into systematic criminal ventures, that it selectively ignored evidence that contradicted the judgement that the Trial Chamber desired, and that distorted the elements of the doctrine of liability that it ostensibly applied.

Within the Grounds of Appeal, Petković addressed the Trial Chamber's unreasoned and erroneous findings "that Petković shared the purpose of creating a *Banovina*-like entity", wherein the Chamber assumed that, through the JCE, the ultimate goal of the HZ[R] HB was to establish a reunified Croatian State that recreated the borders of the 1939 Banovina. Furthermore, the Trial Chamber erred in law and fact when it failed to make any reasonable findings that Petković shared the *mens rea* for "core crimes". The Trial Chamber concluded that, while Petković had knowledge of the criminal plan, he actively contributed to its enforcement, which Counsel contends is outright false. In addition to the last ground involving sentencing, the Notice also asserts that a state of occupation cannot exist during an international armed conflict. For all of the grounds stated, Counsel seeks relief in the form of a verdict of not-guilty or, alternatively, a significant reduction in sentence.

Valentin Ćorić contested the fairness of the proceedings and alleged that the Trial Chamber made "discernible error[s] of judicial logic and derogated from the applicable rules of law". The first and broadest ground of appeal addressed the Trial Chamber's conclusion that a JCE existed. Even if it had existed, Ćorić argued that he was not a member of the JCE, nor that he "made a significant contribution to the execution of that JCE". Additionally, he alleged that the Trial Chamber's conclusion regarding the protected status of Muslim members of the Croatian Defence Council (HVO), under Article 4 of the Fourth Geneva Convention was incorrect. Further, the supposed

Alleged Return to the 1939 Banovina Borders

powers of Ćorić, as Chief of Military Police within the HVO, were said to be erroneously overstated, and this was in addition to myriad factual inaccuracies and an unfounded claim to Ćorić's *mens rea*. For all of these errors of law and fact, Ćorić seeks relief in the form of an acquittal of all charges, or alternatively the Trial Judgement be vacated for a trial *de novo* under new standards. If neither is possible, then it is argued that a substantially reduced sentence is in order.

APPEALS BRIEFS

Because of the Appeals Chamber's decision to harmonise the briefing schedule, all six defence teams and the Office of the Prosecution had 135 days from the issuance of the English translation of the Judgement to submit their Briefs. However, all of the Accused requested extensions on both the time to file their briefs, supported by the Prosecution, and an extension of the word limit. On 22 August, the Appeals Chamber granted these motions in part, granting an extension of time to file by 15 days (until 4 November) and a 15,000 word extension (to 45,000 words). The Prosecution will then have 55 days and 270,000 words (in total) to respond the Defence Briefs.

Prosecutor v. Mladić (IT-09-92)

On 21 July, the last week before summer recess started with the testimony of Nenad Deronjić, a policeman who served in Bratunac and later Srebrenica before transferring to the Border Police. On several occasions, he was also a member of the 2nd Company of the Posebnje Jedinica Policija (PJP); during activities for the PJP he did not report to the police station anymore. For eight days, Deronjić's assignment in Srebrenica was to protect property from looting, but on one instance a looter could not be arrested because

he was armed. The witness resumed his testimony on 22 July in cross-examination, claiming that the duty hours next to his name in a logbook were changed and incorrect, but that he could not tell the Court who had changed these. He was tasked to protect the Domavija Hotel in Srebrenica, even though he did not know of anything of value being in this hotel; during this task he was not in communication with the PJP units. The witness was not aware that his colleagues had been sent off to combat while he was preventing lootings in Srebrenica.

The Chamber continued by rejecting the Office of the Prosecutor's (OTP) objections concerning the probative value of part of Milan Pejić's 92 *ter* Motion, as this objection did only refer to *tu quoque* evidence which did, according to the Judges, not exist. However, the Chamber announced that more general guidance be given before recess.


Milan Pejić

Milan Pejić was a doctor in the Kosevo clinic and in the military hospital in Balzuj and served as head of the hospital. On 22 July he testified that the hospital would treat everyone regardless of his or her ethnicity and even went to great lengths to protect Muslims and Croats from being identified as such to prevent actions of revenge by Serbs. Furthermore, the hospital never received instructions not to treat non-Serbs. Mladić, according to Pejić, visited the hospital several times, including in 1993 when there were particularly many Croatians being treated, and shook hands with every wounded person, regardless of their ethnicity. Defence Counsel stressed the relevance of this behaviour of Mladić to his *mens rea*. Finally, Pejić testified that among five oxygen tanks supplied to the hospital by the United Nations High Commissioner for Refugees or, as pointed out by the OTP, redistributed by Serb authorities, were filled not with oxygen but with gunpowder and mortar fuses. It did not become clear from his testimony whether they were first opened in the presence of the United Nations Protection Force or whether they were only reopened in their presence. But the witness is sure that this military material was intended to reach the Muslim side. Finally, Pejić, as other witnesses before, did not know of sniping and shelling in Sarajevo by Serb forces, but had heard about such incidents against Serb civilians in Serb areas.

On 23 July, Zoran Kovačević, the Commander of the 4th Company in the 2nd Battalion of the Brutanac Brigade testified for the Defence. He was in Potočari giving an interview on the soldiers' morale after years of war, shortly before Mladić arrived there. The busses seen on the video interview did not attract Kovačević's attention at the time, but he heard large vehicles passing by at night. However, Kovačević did not confirm that Mladić separated some men from the rest to take them away in a car, as Nedžiba Salihović had reported to the OTP. Moreover, he could not confirm gunfire or people being pulled on to busses and testified that he would have never been involved in such events as, after all, some of the civilians were his neighbours. Resuming his testimony on 24 July, Kovačević testified that Mladić was only accompanied by a maximum of eight soldiers and not by thousands as other witnesses recalled. Mladić, rather, had arrived by foot to the area, where masses of people had fled from Srebrenica. The witness also did not see Mladić addressing the crowd with loud-speakers.

Finally, before the recess, the Chamber gave its announced guidance to the parties. The Judges drew the parties' attention to the fact that too often evidence of questionable relevance or questionable probative value was adduced and that evidence did not always relate to any recognisable defence. Furthermore, witnesses too often turned out to have obtained their knowledge by the media only and made sweeping generalisations. Then, the Judges asserted that both parties offered unnecessarily repetitious evidence. With particular regard to the Defence, the Judges stressed that alarming statement-taking practices were reported, including pressure to sign despite errors or witnesses signing statements they had not even read carefully.

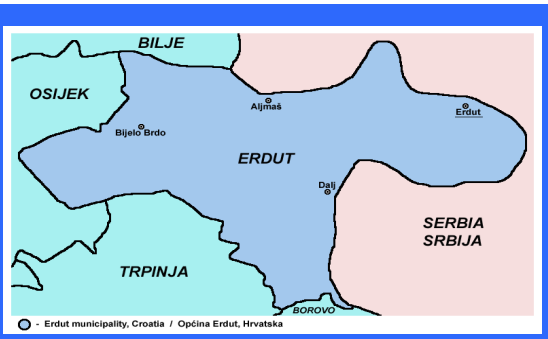
This guidance was addressed and challenged by Defence Counsel Branko Lukić immediately after summer recess, on 25 August. The Defence reserved the right to be treated in the same way as the Prosecution had been treated while presenting its case. Lukić disagreed fundamentally with the findings of the Trial Chamber: given the general nature of the indictment,

especially the alleged Joint Criminal Enterprise (JCE) including not only numerous military and civilian leaders but also the Serbian population, the Defence strongly insisted on the relevance of all its witnesses. Moreover, as Defence Counsel put it, the general nature of the indictment made it impossible for the Defence to call a witness that was not relevant to the indictment. With regard to allegedly insufficient preparation of witness statements by the Defence, Lukić stressed the lack of resources of the Defence team compared to the Prosecution's resources. The Prosecution dismissed the preliminary matters on the ground that the court rules were within the discretion of the Trial Chamber, and did not comment on the guidance further.

Prosecutor v. Hadžić (IT-04-75)

On 17 July, the Defence for Goran Hadžić conducted its last day of examination-in-chief of the Accused. The examination mainly dealt with the Prosecution of crimes in the region of Slavonia, Baranja and Western Srem (SBWS), and later in the Serb Autonomous Region of Serbia Krajina (RSK). In this respect, the Defence presented a large number of indictments and judgements from the indictment period to the witness, which evinced the criminal prosecution of perpetrators belonging to all ethnicities, in particular for crimes committed against non-Serbs. Subsequently, the Defence addressed Hadžić's political career after he left RSK politics in 1995; particularly his appointment as chairman of the Crisis Staff for the reception of refugees in the aftermath of Operation Flash in 1995, and his diplomatic efforts to achieve the peaceful reintegration of the SBWS region into Croatia.

At the beginning of the Office of the Prosecutor's (OTP) cross-examination the same day, Hadžić was further questioned about his role in the eventual reintegration of the Slavonia and Baranja regions. According to his account, he had no political power to achieve such reintegration during his service in a public office; accordingly, he could only enter the peace process after large parts of the previously Serb-held territories in Croatia had already been lost, *inter alia* in the course of Operation Flash. The Prosecution then turned towards Hadžić's relationship with Željko Raznatović, also known as Arkan. He reaffirmed that he did not maintain any relations with Arkan or associate himself with him, that he considered Arkan a dangerous person, and that Arkan never provided security for him. Even when the offices of the SBWS government were located close to the training centre used by Arkan's unit in Erdut, Hadžić did not meet Arkan frequently. Similarly, he never deliberately met with Arkan in an official capacity; on the contrary, Arkan tended to follow him around to meetings and gatherings and tried to get close to him in public. Hadžić further recalled that his decision to replace Milan Martić as Minister of the Interior of the RSK on 9 October 1993 was a consequence of Martić's decision to de-mine a field near Mali Alan and was not, as asserted by the Prosecution, due to Martić's opposition to Arkan.



Erdut and Dalj Region

The second day of the OTP's cross-examination on 21 July continued with the discussion of Hadžić's relationship with Arkan. The witness reaffirmed that he was aware that Arkan was at the training centre of the Serbian Ministry of Interior Affairs (MUP) at Erdut, but he did not know which position he held there. When Hadžić attended a meeting of the SBWS government at the Velepromet facility near Vukovar on 20 November 1991, he encountered Arkan there as part of the security detail for the government as a whole. Generally, Hadžić emphasised that he and Arkan were at no point political allies; he was not aware whether Arkan still performed military tasks during his service as a deputy in the Assembly of Serbia, nor whether he was in direct command of the Serbian Volunteer Guards unit which was stationed in Velebit in October 1993, when the incident occurred which led to the conflict between Hadžić and Martić.

Hadžić never heard that Arkan was involved in crimes of any sort, save for one instance where he issued threats to Milan Babić in order to convince him to accept the Vance Plan. Moreover, he contradicted statements by Zivota Panić, at the time acting Chief of the General Staff of the Yugoslav National Army (JNA), who had stated that Arkan was subordinate to Goran Hadžić; according to Hadžić, such statements were merely aimed at distracting from the JNA's responsibilities for Arkan's actions.

Goran Hadžić further testified that Mirko Jović, Milan Paroski and Vojislav Šešelj were political rivals of his. Though he had interacted with Paroski before the war, the latter belonged to a different party and was active in another state, namely Serbia. With respect to Jović, Hadžić only met him later, and even though Jović visited the SBWS frequently, he became a political ally of Milan Babić, which made him an opponent of Hadžić. Generally, Hadžić stated that he knew nothing of the crimes allegedly committed by Jović's "White Eagles" volunteer unit. Last, Šešelj was a member of the Serbian Radical Party, which represented political positions very different from those held by Hadžić. At the end of the trial day, Hadžić was questioned on his first meeting with Radovan Stojičić, known as Badža, in Dalj in August 1991, which was also attended by two Serb policemen and Arkan. Later, he met Badža and Arkan in Erdut after they had taken over the local training centre, though he did not know whether both of them had arrived in Erdut together.

On the third day of his cross-examination, Goran Hadžić was asked about the creation of the Serbian National Council (SNC) for the SBWS on the 7 January 1991. It was put to Hadžić by Chief Prosecutor Douglas Stringer, that the principal objective of the SNC was to establish a "line of separation" between Croats and Serbs so as to facilitate the expulsion of ethnic minorities and create "homogenous ethnic populations" on either side of this line. As a founding member of the SNC, and its future President, Goran Hadžić was well placed to articulate whether this was the case. Hadžić vehemently denied this was the goal of the SNC, claiming that the organisation was formed to "serve the interests of the Serbian people" and represent all Serbs, not just those who were members of the Serbian Democratic Party (SDS). At the time of the founding of the SNC, war was unforeseeable. Simply put, there was a "need for somebody to represent Serbian interests" and Hadžić took it upon himself to fill this role. The SNC sought to keep Croatia in Yugoslavia and prevent possible ethnic conflicts, not try and create pockets of ethnic homogeneity or spark a violent confrontation. Following up on this line of questioning, the OTP quizzed Hadžić on the timing of his appointment to the presidency of the SNC. Stringer claims that it was public knowledge as of the 10 of April 1991, that Goran Hadžić had been appointed to this position and infers from Hadžić's subsequent arrest at Plitvice that he was targeted by the Croatian authorities for precisely this reason. Furthermore, Stringer suggested that Hadžić's presence at Plitvice National Park two days after it had been seized by Milan Martić and the Krajina police could not be a coincidence. Again, Hadžić denied any knowledge of these events, asserting that, even if he had heard of the seizing of Plitvice, he would not have been interested as it had nothing to do with either himself or with Slavonia and Baranja. As for his appointment to the presidency of the SNC, Hadžić maintained that did not occur until long after Martić's seizing of Plitvice.

On 23 July, the extent of Goran Hadžić's powers as Prime Minister of SBWS was called into question. It was Prosecutor Stringer's belief that Hadžić was "minimising the role that [he] played and the extent to which [he] had the ability and the authority to select those who would be members of [his] government". Stringer suggested Hadžić had the power to appoint whoever he wanted to serve as a minister in his government and that his choices would be approved by the Assembly without further inquiry. Hadžić replied that, while formally, this was true, in practical terms it was not. His role could not be minimised, "to the extent that it was [already] really minimal". According to Hadžić, he was completely cut off from government functions and was forced to rely on acquaintances to relay messages asking others to come to Dalj to discuss formal matters. In his words, his role was "ten times less significant than you may think". Goran Hadžić was also questioned about a video in which he was quoted as saying that "peaceful co-existence [was not] possible following [the] recent incidents and under [the] circumstances". In response to a question regarding whether he had already given up on peaceful co-existence by early 1991, Goran Hadžić put his quote in context, pointing out

that he had gone on to say that he did not feel peaceful co-existence was possible under the circumstances, namely, the distribution of tens of thousands of weapons to local Croats. Furthermore, he had, in the video in question, urged the president of Yugoslavia to seek peaceful compromise and had was on the record as saying that he was "not for bloodshed" and felt "that is the last thing that should happen".

The next day of the cross-examination, 24 July, started with a discussion on the authority of the SBWS government to appoint persons to the executive councils of the municipalities. Hadžić signed and approved his appointment to be President of the Beli Manastir Executive Council as a "mere formality" pursuant to Borivoje Zivanovic's democratic election by the municipality's citizens. Hadžić's authority over and responsibility for Zivanovic's supposed "campaign of violence and terror" in Beli Manastir during his term in office was elaborated upon. The issue of refugees and ethnic migration within the RSK was discussed at length, including the United Nations Protection Force's responsibility for ensuring the safety of refugees as well as that of the JNA. The appointment of Miruljub Vujuvić as Territorial Defence Forces (TO) Commander in Vukovar and Goran Hadžić's subsequent awareness of and responsibility for crimes attributed to Miroljub Vujović within Vukovar municipality were discussed. Legislation regarding property was discussed briefly whereas Hadžić's relationship with Milan Ilić was debated at length. Ilić was appointed President of the Executive Council of the Dalj municipality by Hadžić. The final hour of the day went into discussing statements attributed to Hadžić in the media during the conflict. In particular, the Prosecution pointed out several statements made by Hadžić that could be construed as nationalistic or divisive in nature and the influence of said statements on the actions of the Serbian population in the area was considered. According to Hadžić, most of the statements were taken out of context, did not reach a wide audience within the SBWS/RSK and were a result of his inexperience as a politician.

On 25 August and after summer recess, cross-examination opened with a discussion on legislation regarding public property in the Dalj area. The settlement of Serbs in the abandoned houses of non-Serbs in various areas and refugee issues in general were debated. Hadžić's calls for displaced Serbs to temporarily resettle in the SBWS were elaborated on wherein Hadžić explained that he considered it a humanitarian issue. The main issues of the day were the ethnic composition of several towns and municipalities pre- and post- conflict, whether Hadžić knew or should have known about the mass exodus of non-Serbs from areas within Vukovar and Vinkovki and his alleged complicity in the supposed ethnic cleansing of said areas. Hadžić's involvement with and influence over JNA policies regarding housing issues during the conflict was covered at length. In general, Hadžić maintained that he had no authority over JNA policies or practices. The remainder of the cross-examination was spent on discussing Hadžić's relationship with three men: Vojin Šuša, the Minister for Justice and Administration Hadžić's Government; Milan Ilić, President of the Executive Council of the Dalj municipality and Boro Bogunović, who was the Deputy Prime Minister in the SBWS and their role in controlling housing issues for refugees within the SBWS at the time.

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

On 24 July, the Appeals Chamber issued its *Decision on Mićo Stanišić's Motion Seeking Reconsideration of Decision on Stanišić's Motion for Declaration of Mistrial and Župljanin's Motion to Vacate Trial Judgement*, which had dismissed the motion filed by Stanišić and Župljanin.

On 23 October 2013, in light of the findings in the case *Prosecutor v. Vojislav* Šešlj, that Judge Harhoff's presumption of impartiality had been rebutted, Stanišić filed a motion requesting that the Appeals Chamber declare a mistrial and vacate the Trial Chamber. This motion was dismissed by the Appeals Chamber on 2 April, in the *Decision on Mićo Stanišić's Motion Requesting a Declaration of Mistrial and Stojan Župljanin's Motion to Vacate Trial Judgement*.

Stanišić requested a reconsideration of the Appeals Chamber's decision on 10 April, on the grounds that the *Šešelj* Decision regarding Judge Harhoff has a direct correlation to the case *Prosecutor v. Stanišić*

and Župljanin, as he was one of the Judge's sitting on the trial. Stanišić further stated that in dismissing his request for a declaration of mistrial, there was no longer any valid Trial Judgement to base future decisions on, and to continue without allowing his motion would amount to a "serious violation of his fair trial rights".

In its response to Stanišić's motion, the Prosecution noted that Stanišić failed to demonstrate a clear error of reasoning on the part of the Appeals Chamber, or that reconsideration was necessary to prevent an injustice. The Prosecution asserted that the issue of the violation of fair trial rights could be solved by the normal appellate process, and that immediate interlocutory relief, as requested by Stanišić, was not necessary. Stanišić replied that the Prosecution's response did not address the issue central to his submission, the effect of the *Šešelj* Decision on his case.

In the 24 July Decision, the Appeals Chamber acknowledged that Stanišić's assertion that the Chamber did not address the impact of the *Šešelj* findings was correct, and submitted that they assessed whether the results of the *Šešelj* Decision were binding on *Stanišić and Župljanin* and determined that they were not. It further stated that if any injustices were caused to the fair trial processes of Stanišić or Župljanin, then those would be found in the normal appellate process.

In light of these findings, the Appeals Chamber determined that there was no basis for Stanišić's submission that there is "no valid trial judgement upon which to base or continue with the appellate process". The Appeals Chamber also rejected the idea that it should reconsider the Motion of 23 October 2013, as it did not discern any reasonable error in its previous decision nor did Stanišić reasonably demonstrate any such error.

Judge Koffi Afanđe, who is part of the Appeals Chamber for *Stanišić and Župljanin*, reaffirmed the Appeals Chamber decision to dismiss the motion, despite having a dissenting opinion on the *Šešelj* Decision.

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

DECISION ON THE ACCUSED'S MOTION TO DISQUALIFY JUDGES KWON, MORRISON, BAIRD, AND LATTANZI

On 17 July, the Accused submitted a motion to disqualify Judges Kwon, Morrison, Baird and Lattanzi. Pursuant to Rule 73 of Rules of Procedure and Evidence of the ICTY, the Motion moved to disqualify the Judges from continuing to serve on the Karadžić case as their four-year terms of office have expired.

The Judges were not re-elected, but were given an extension of their mandates by the Security Council, who Karadžić has argued does not have the proper jurisdiction to do so. He argued that the power to extend mandates is under the jurisdiction of the General Assembly. According to the Accused, "the purported extension of the terms of the office by the Security Council violated the express terms of the Tribunal's Statute". Karadžić requested the President of the Tribunal to appoint a three-judge panel "as it would be improper for the above mentioned judges to rule on their own term of service".


Radovan Karadžić

On 24 July, the Office of the Prosecutor (OTP) filed their response arguing that the motion should be denied. The response argued that the Security Council could extend a mandate by passing a resolution, as in the case *Prosecutor v. Krajisnik*.

The OTP further argued that "there has been no infringement of the General Assembly, as argued by the Accused, because the Assembly has in fact approved extensions of the terms of office of the Karadžić Judges, as well as the *ad litem* Judges' ability to sit on the present case beyond the three-year limit found in Article 13 *ter* (2) of the Statute".

The Chamber had decided to not use the provisions of Rule 15 and decided to "deal with the motions of the merit itself" and not send it to the President. The Mo-

tion was denied on 31 July by the Chamber, pursuant to Rule 54 and Article 21 (4) of the Statute.

DECISION ON INVITATION FROM THE SINGLE JUDGE OF THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

On 21 July, the Accused submitted a motion regarding the *Decision on Invitation from the Single Judge of the Mechanism for International Criminal Tribunals* which invited the ICTY Trial Chamber in the Karadžić case to determine whether there is "Reason to Believe" that contempt has been committed by Members of the OTP.

Pursuant to Rule 90 (c) of the MICT Rules "where a contempt matter arises before the tribunal, that matter has 'the authority to determine' if a person may be in contempt, by determination of a single Judge".

Considering, by majority, Judge Howard Morrison dissenting, "the Chamber found that the Prosecution has violated its disclosure obligations on numerous occasions, it has never found that such violations were indicative of a lack of good faith on the part of the Prosecution".

The Chamber informed the Single Judge "that there is no reason to believe that contempt may have been committed by members of the Prosecution with the multiple disclosure violations in the case".

On 22 August, Single Judge Vagn Joensen reached a decision regarding the request and found that taking into account the Decision by the Trial Chamber, Judge Morrison dissenting, Karadžić's request moot and dismissed the motion in its entirety.

LOOKING BACK...

International Criminal Court

Five years ago…

From 28 July to 4 August 2009, The Outreach Unit and the Victims Participation and Reparations Unit of the International Criminal Court, conducted a joint mission in Kivus in the Democratic Republic of the Congo to raise awareness among the population about victim participation at the ICC.

Outreach meetings were organised, targeting civil society, representatives of NGOs, students and women's associations. Overall, 502 people attended the six outreach meetings in Béni and Bukavu.

The public received information on the Court's role and its mandate, part of these meetings was dedicated to the participation of victims in proceedings before the ICC, which is a relatively new practice in international criminal law.

The second objective of the mission was to launch a radio programme in the region, which lead to the creation of Radio Graben and Radio Muungano in Béni, and Radio Maendeleo in Bukavu, broadcasting the programme "The ICC at a Glance".

The programme gave information about the Court's activities and had an interactive nature, ultimately serving as a forum for dialogue between the Court and the public.

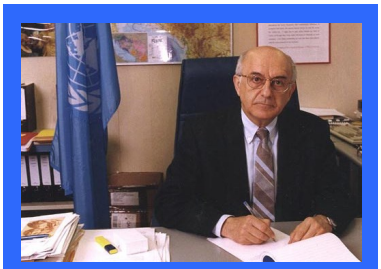
Meeting in Beni © ICC-CPI

Special Tribunal for Lebanon

Five years ago…

On 14 September 2009, President Antonio Cassese presented a Six-Month Report, offering an overview of the STL's activities in the six months elapsed since its establishment. The report highlighted the most important actions taken by Chambers, Registry, Office of the Prosecutor and Office of Defence.

The report presented the Registry's efficient preparations, which at the time established a practical infrastructure, facilitating the recruitment of experienced staff and the rapid approval of legal documents related with the functioning of the Tribunal.



President Antonio Cassese

In his report, Cassese also mentioned the intense contacts of the Head of the Defence Office with Lebanese bar associations, reflecting on the challenges that the Tribunal had to meet at that time and reiterating the STL's goal of delivering justice with no political or ideological interference.

International Criminal Tribunal for the Former Yugoslavia

Fifteen years ago…

On 6 August 1999, the ICTY Registrar withdrew the assignment of Defence Counsel to seven Accused. Mario Čerkez, Drago Josipović, Mirjan Kupreškić, Vlatko Kupreškić, Zoran Kupreškić, Dragan Papić and Vladimir Santić were considered no longer indigent after fundraising.

The seven Accused were presumed to have received funds from the organisation "Hrvatski Uznik u Haagu" ("Croatia Prisoners in The Hague"), most of the financial support was raised through art auctions in Mostar and Bosnia and Herzegovina reaching an estimated 4,300,000 Deutsche Mark (DM).

After being surrendered to the custody of the ICTY, the Accused claimed that they did not have sufficient financial means to support the cost of legal assistance and requested the assignment of Counsel, which at the time was attributed by the Registrar.

Article 19 of the Directive on the Assignment of Defence Counsel, indicates that the privilege of the assignment of Defence ends when information obtained proves that the Accused have sufficient means to support the costs of private Counsel.

Based on this information, the Registrar decided to withdraw the assignment of Counsel, and costs and expenses ceased to be met by the Tribunal.

NEWS FROM THE REGION

Bosnia and Herzegovina

Six Bosnian Serbs Convicted of Genocide Appeal Against Harsh Sentence

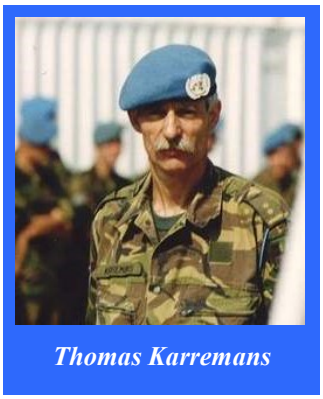
Six men, who were jailed for the genocide in Srebrenica in 1995, appealed against their 20-year sentence, claiming that it was too harsh. The lawyers of the six convicted, Slobodan Jakovljević, Aleksandar Radovanović, Branislav Medan, Brana Džinić, Milenko Trifunović and Petar Mitrović, asserted that "15 years was the harshest penalty envisaged by the Criminal Code of the former Yugoslavia".

The appeal is now part of a series of legal initiatives which have managed to overturn a number of genocide convictions by the Constitutional Court, due to the application of the wrong criminal code. The Bosnian Criminal Code was not in force at the time the crimes were committed, however it was applied on several sentences.

The Defence of the six convicted argued that the Bosnian Court failed to examine the men's allegations, violating their right to a fair trial, pleading the Constitutional Court to rectify situation. However, according to the men's lawyers the decision on the appeals can take several years to be made.

Srebrenica Survivor Demands War Crimes Charges for Senior Dutch Soldiers

Bosnian citizen Hasan Nuhanović filed a request with the Military Chamber of the Appeals Court in Arnhem in the Netherlands, demanding the prosecution of three Dutch Commanders for war crimes. Nuhanović was a UN interpreter for the Dutch peacekeepers in Srebrenica, who in 2011 won an appeals case against the Netherlands for not having prevented his father and brother's deaths in 1995.



Thomas Karremans

Last month, the Netherlands was found guilty of failing to protect approximately 300 men, escaping Serb forces by hiding in the Dutch military compound in Potocari. For more information read the Defence Rostrum of the ADC-ICTY Newsletter, Issue 72.

While the District Court of The Hague ruled the Netherlands, liable for the fate of the 300 Bosniaks, the Dutchbat commander Thomas Karremans and his assistants Robert Franken and Officer Berend Oosterveen were not personally held criminally responsible for the massacre.

Kosovo and Serbia

Bodies of Kosovo Albanians Found in Serbia

On 22 August, 16 bodies of Kosovo Albanians were found near Raška in Southern Serbia. The bodies were identified and handed over to their families in Merdare. 46 bodies were found in total, however, some remains could not be identified.

The Kosovo Government Commission on Missing Persons also initiated a search three weeks ago at the Rudnica quarry, however ,it had failed to uncover any further human remains.

On 29 August, the Presidents of Croatia, Serbia, Montenegro and the Chairman of the Presidency of Bosnia and Herzegovina signed a Declaration on Missing Persons in Mostar. This Declaration recognises the results achieved in tracing missing persons from the 1990's wars and aims at a continued willingness to search for the remaining persons. 30 August marked the International Day of Missing Persons.

There are still 1,700 people missing as a result of the conflict in Kosovo. Both Presidents of the Kosovo and Serbian Government's Missing Person Commissions indicated that soon the search in southern Serbia will come to an end.

NEWS FROM OTHER INTERNATIONAL COURTS

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.

Ayyash *et al.* Case

Mohammed Kheireddine was the last witness appearing for the Prosecution on 22 and 23 July before the judicial recess. The witness is a First Officer in the Internal Security Force (ISF) in Lebanon. On 14 February 2005, as Adjutant in Chief in the ISF Judicial Police, Kheireddine was ordered to attend the crime scene at the St. Georges area together with two other officers. They took pictures, videos and notes of what they observed at the blast site. The witness and his team also went to hospitals to take pictures of the deceased victims and to obtain fingerprints of their relatives, where possible.

Following his direct examination Kheireddine was cross examined by the Merhi Defence. Legal Consultant for the Merhi Defence team asked the witness to clarify his current position and to provide more details about his professional experience. The witness explained that the explosion of 14 February 2005 was his first crime scene of the kind that he attended. Kheireddine stated that after writing a report based on the notes they took from the crime scene, the notes were destroyed, and that this is the routine procedure in Lebanon. Other questions on the preservation of the crime were put forth before the victim.

Three Additional Victims Participating in the Proceedings

On 18 July, the Pre-Trial Judge (PTJ) issued a decision granting three individuals the status of victims participating in the proceedings (VPP) after the Registry's Victims Participation Unit transmitted applications from four individuals. Upon being satisfied that three of the applicants meet the cumulative requirements of Rule 86 of the Rules of Procedure and Evidence, the PTJ granted them a VPP status in the *Ayyash et al.* proceedings. The PTJ deferred from deciding on the application of a fourth person until he receives additional information.

The Contempt Case Against NEW TV S.A.L. and Karma Mohamed Tahsin al Khayat

The Contempt Judge has issued a decision in a public hearing on 24 July, ruling that the STL does not have jurisdiction over cases of alleged contempt and obstruction of justice against legal persons (corporate entities). However, Judge Nicola Lettieri confirmed that under Rule 60 *bis* the Tribunal does have inherent jurisdiction to hear cases against offences related to the administration of justice against natural persons.

Judge Nicola Lettieri

The Contempt Judge's decision comes after the Defence for NEW TV S.A.L. and Karma Mohamed Tahsin Al Khayat submitted a motion on 16 June 2014 challenging the jurisdiction of the Tribunal to hear cases of contempt in relation to legal persons.

Given that the Contempt Judge received numerous submissions from *amicus curiae* contending that the Tribunal has no jurisdiction over-contempt and obstruction of justice

in general, he found it appropriate to address this fundamental issue in his decision *proprio motu*.

On 31 July, the *Amicus Curiae* Prosecutor has appealed this decision to a three-Judge Appeals Panel, challenging the finding that the Tribunal cannot charge legal persons with contempt under Rule 60 *bis*. Also on 31 July, the *Amicus Curiae* Prosecutor filed an urgent request, requesting the Appeals Chamber to suspend the orders set out in the decision and the related scheduling order of 24 July, in particular the deadline for the filing of the pre-trial briefs, until such time as the appeal has been decided upon.

Extraordinary Chambers in the Courts of Cambodia

By Cecile Roubeix, Intern on Case 002, Defence team

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

The Judgement in case 002 was announced on 7 August. Nuon Chea and Khieu Samphan were both found guilty of crimes against humanity committed between 17 April 1975 and December 1977 and sentenced to life imprisonment. Their Defence teams are working vigorously on an appeal. They filed a joint motion to request an extension of the deadlines and page limits for the appeal (ECCC Rules allow 30 days to file the notice of appeal and then 60 days for the appeal brief).

The Nuon Chea and Khieu Samphan Defence teams have also remained hard at work preparing for the upcoming trial in case 002/02. Their work has mainly focused on examining the documents, experts and witnesses proposed by the Co-Prosecutors and Civil Party Lead Co-Lawyers and working on the order of the examination of evidence. An initial hearing was held on 30 July.

The case 003 Defence team has continued to file submissions (classified as confidential by the Office of the Co-Investigating Judges and Pre-Trial Chamber) to protect the suspect's fair trial rights, and continues to review publicly available material, since the Case File remains inaccessible to the Defence team.

The Pre-Trial Chamber also rejected the decision of the International Co-Investigating Judge concerning the appointment of Co-Lawyers ANG Udom and Michael Karnavas to case 003, finding that there is no conflict of interest stemming from the Co-Lawyers' previous role in defending Ieng Sary in case 002.

In case 004, the Defence teams have continued to file motions to protect their clients' rights as suspects and prepare their clients' defence by reading all publicly available information concerning the potential cases against their clients. The Defence teams have argued that their inability to access the Case File violates their clients' fair trail rights.

One of the Defence teams is preparing to appeal a decision denying it access to the Case File; it has requested access to all documents cited in the decision. The Defence team has also appealed a decision denying it the ability to conduct its own investigation.

Case 002/1 Judgement

DEFENCE ROSTRUM

Drones in the Legal Context: An Argument of Interpretation

By Benjamin Schaefer

In recent years warfare has advanced at a prodigious pace, often faster than the legal system can keep up with. Weapons become more and more lethal, able to kill hundreds of people with little threat to the attacker. One of the most controversial of these weapons are unmanned aerial vehicles (UAV), also known as drones. Some have hailed drones as a marvel of modern weaponry, the possibility to carry out swift, lethal attacks against high profile targets while the pilot of the UAV remains safe half a world away is highly advantageous. Others denounce drones as unlawful, citing the massive collateral damage they tend to inflict, often in the form of civilian casualties, as a basis for their illegality.

The debate on drones generally focuses on their use by the United States (US) on its so-called "global war on terror" (since renamed "Overseas Contingency Operations"). Under the auspices of this conflict the US government claims that their actions are within the confines of International Humanitarian Law (IHL), thus it is legal for them to use UAVs to carry out targeted killings of high-profile targets in countries such as Pakistan and Yemen. On the other side-critics have cited many laws and customs of IHL which they claim the US has reinterpreted far too leniently in order to suit their actions, namely, that they have stretched IHL to allow for the legality of targeted killings that would be unacceptable in more instances. These critics claim that under an examination of the facts in place, it becomes obvious that the US has no legal basis for the use of UAVs.

General Atomics MQ-9 Reaper UAV

From a legal perspective, the means by which a targeted killing is carried out is much less significant than the circumstances surrounding it. Certain parameters must be satisfied for such a killing to be legal under IHL. First, a situation of armed conflict must exist in the area where the targeted killing is carried out. Based on the precedent set by the ICTY case *Prosecutor v. Tadić* (IT-94-1), an armed conflict is determined to exist "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State". Further, the precedent of *Prosecutor v. Tadić* stipulates that there is a threshold of "intensity and organisation" of the groups participating in the vioence that must also be met. If these conditions are satisfied the targeted killing of valid military targets is acceptable and protected under IHL.

These particular stipulations bear further analysis as they formulate core components of the arguments both for and against drone strikes. Article 2 of the Second Geneva Convention asserts that an armed conflict can occur either between two "High Contracting Parties" or within "the territory of one of the High Contracting Parties", such as a conflict between a state and a national movement within that state. Under these parameters, a national moevement would fall under the classification of a "non-State actor". The question then becomes whether or not an international terrorist group such as al Qaeda can constitute a "High Contracting Party". The US government argues that it can. They say that Additional Protocol I, Article 1 (4) allows for conflicts between States and national liberation movements which are non-State actors; in fact, Article 1 (4) refers to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist *régimes* in the exercise of their right of self-determination". The reasoning follows that if non-

States actors are allowed to be considered belligerents in the conflict, then an international terrorist organisation fits the description and can be considered a valid military target. Moreover, as mentioned above, *Tadić* asserts that for a group to participate in an armed conflict they must exhibit a structured organisation. The US asserts that al Qaeda and the Taliban both exhibit this characteristic, so they can be defined as a non-State actor in an international conflict. The opposing opinion states that the Convention does not set out to involve any non-State actor that the US determines sufficient, and that al Qaeda does not constitute a High Contracting Party as is necessitated. For these critics a non-State actor with no territorial occupation and no national attributes is far beyond what the Second Convention covers.

Does the conflict between the United States and terrorist organisations such as al Qaeda count as an armed conflict or is it merely a situation of violence for which IHL does not cover? On one side of the argument, the US has claimed that the terrorist attack on 11 September 2001, constituted a serious attack, thus allowing them to use their right of self-defence against the terrorist organisations that perpetrated the attack. As the terrorist organisation that facilitated the attack meets the obligation set forth by *Tadić* and the Geneva Conventions, it constitutes a valid belligerent for establishing an armed conflict. In this line of thinking, any area that a known terrorist is located can be considered a combat zone. Conversely, critics of UAV targeted killings argue that a single terrorist attack does not allow for a declaration of war as self-defence as a legitimate response. Thus, whether a terrorist organisation constitutes a valid belligerent for an armed conflict is irrelevant as the premise for declaring war against the terrorist organisation is flawed at the outset.

If it is assumed that the areas where drone strikes occur are not in combat zones, then the role of the US becomes that of a law enforcement agency. Critics of drone use argue that a law enforcement agent is only allowed to use lethal force in the most extreme circumstances, and thus regular law enforcement measures are the only legal means of dealing with terrorists in these areas. While the US maintains the position stated above, that they are in a legitimate combat zone, there are some scholars who postulate that even if the US is acting as a law enforcement agency, they have a right to use lethal force because high ranking terrorists pose an immediate threat to American safety, a threat that could be carried out at anytime and in any place. Further arguments against the US' use of UAVs cite the idea of proportionality as a notable flaw in the legal arguments for drone use. Additional Protocol I to the Geneva Conventions of 1949, Article 51 (5) (b) prohibits certain attacks, such as "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated". So long as the collateral damage of the attack does not outweigh the military benefit, the attack would seem to be legal under IHL. In light of this, supporters of targeted killing say that the collateral damage of drone strikes is justified as the value of eliminating the high profile targets far outweighs the civilian casualties that such attacks may cause. On the other hand, critics argue that there is no proper way to measure the value of a human life in regard to the value of a military target, therefore to say that collateral damage can be proportional to the value of a military target is a generalisation. In this regard the law is ambiguous, as there is no direct way of determining how much collateral damage would be "excessive" in relation to the anticipated military advantage.

Geneva Conventions of 1949 Additional Protocol I

Article 51 (5)

Protection of the Civilian Population

Among others, the following types of attacks are to be considered as indiscriminate:

(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

A final point of contention is the US' use of Central Intelligence Agency (CIA) personnel to carry out such attacks. Under IHL military personnel and other vol-

untary fighters have a right to kill valid military targets, in the understanding that they themselves are valid military targets who can be lawfully killed in an armed conflict. Civilians however are protected under IHL and cannot be killed (except under the principle of proportionality listed above). However, if civilians participate in hostilities, then they forfeit their right to immunity from the conflict and become viable military targets for as long as they participate in the hostilities. Article 51 (3) of Additional Protocol I to the Geneva Conventions of 1949, states that "civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities". Many critics of CIA personnel conducting drone strikes is that because they are not part of the military they should not be able to attack military targets. Moreover, these critics often state that CIA operatives are not held to any moral standard or code of behaviour like military personnel are. They can, in a sense, inflict horrendous amounts of damage with no fear of retribution. While these points are valid, the law is very clear that a civilian can take part in hostilities, though in the understanding that for as long as they participate in the hostilities they become a legal and valid military target for the opposing side of the conflict. The US argues that this portion of the law is extended to CIA personnel, so as long as they are aware that they may be attacked, they can legally conduct drone strikes.

Geneva Conventions of 1949
Additional Protocol I

Article 51 (3)

Protection of the Civilian Population

Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

An analysis of IHL's relationship to the use of UAVs in targeted killings is inherently complex, and this brief overview of the debate provides nowhere near the proper depth of the argument to form an opinion on whether drone strikes, especially those used by the US against high profile terrorists, are legal. Perhaps the greatest point to take away is that much of the interpretation of the legality of drone strikes is dependent on whether the conflict itself is legal, and constitutes an "armed conflict" as stipulated by IHL. If such a conflict can be determined, then it would seem that the US has legitimate case for their use of drone strikes. Should an armed conflict not exist, then many of the arguments put forward by the US rest on the necessity that every terrorist killed represents a serious and immediate threat to the American people; which, debatably, is a much more precarious position for America to be in. In light of the many interpretations that have been stated in this article, there can be no sweeping judgement on the legality of *all* drone strikes. Some drone strikes are probably legal, just as others are most likely illegal. Until such a time as a more clear law is formulated and a more reliable fact gathering method is established, most drone strikes will continue to skirt the edge of legality, hedging on the application of secretive military strategy under the auspices of indeterminate international laws.

BLOG UPDATES AND ONLINE LECTURES

Blog Updates

Michael G. Karnavas, **Associated Press Quotes Karnavas on Eve of Khmer Rouge verdict,** 6 August 2014, available at: http://tinyurl.com/pubccrl.

Antoine Buyse, **Violation of Religions Rights in Hungary Judgement,** 11 August 2014 available at: http://tinyurl.com/nclethm.

Andrew Thomas, **Australia Gun Laws May Provide Lesson for US,** 22 August 2014, available at: http://tinyurl.com/phmp5nl.

Drea Becker, **William Schabas Appointed to Chair Gaza Inquiry,** 26 August 2014, available at: http://tinyurl.com/kwww6b5.

Online Lectures and Videos

"Women in International Law", by the American Society of International Law, 31 July 2014, available at: http://tinyurl.com/oouccjh.

"Forced Population Transfer in International Law" , by Prof Joseph Schechla of the Habita, 10 August 2014, available at: http://tinyurl.com/oftkks2 .

"Terrorism and Counterterrorism: Comparing Theory and Practice", by Leiden University, 8 September 2014, available at: http://tinyurl.com/mqdoejz.

"Revolutionary Ideas: An Introduction to Legal and Political Philosophy", by University of Pennsylvania, 21 September 2014, available at: http://tinyurl.com/qe5az09.

PUBLICATIONS AND ARTICLES

Books

Gerhard Werle & Florian Jeßberger (2014), *Principles of International Criminal Law*, Oxford University Press.

Derek Jinks (2014), *Applying International Humanitarian Law to Judicial and Quasi Judicial Bodies - International and Domestic Aspects*, T.M.C Asser Press.

Carlos Fernández de Casadevante Romani (2014), *International Law of Victims*, Springer.

David D. Caron, Michael J. Kelly (2014), *The International Law of Disaster Relief*, Cambridge University Press.

Articles

James G. Stewart (2014), "The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute", *Journal of International Law and Politics*, Vol. 47.

Alexia Solomou (2014), "Comparing the Impact of the Interpretation of Peace Agreements by International Courts and Tribunals on Legal Accountability and Legal Certainty in Post-Conflict Societies", *Leiden Journal of International Law*, Vol. 27, No. 02.

CALL FOR PAPERS

The **Lex Mercatoria Publica Project** at the Max Planck Institute in Heidelberg has issued a call for papers for their conference titled "The (Comparative) Constitutional Law of Private-Public Arbitration".

Deadline: 15 September 2014 More info: http://tinyurl.com/l7de8rg

The **AALS International Human Rights Section** has issued a call for papers for its Annual Meeting programme on "Global Perspectives on Human Rights":

Deadline: 15 September 2014 More info: http://tinyurl.com/kvetffe

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

NEW WEBSITE

The ADC-ICTY would like to express its appreciation and thanks to Isaac Amon, Philipp Müller and Lucy Turner for all of their hard work and dedication to the Newsletter. We wish them all the best in their future endeavours.

EVENTS

The Islamic State in Iraq and Syria: The Role and Future of Extremist Groups in the Region
Date: 15 September 2014
Location: Leiden University, The Hague Campus—Kantoren Stichthage, 13th Floor
More Info: http://tinyurl.com/mcwfmgj

Experiences of the Greek Presidency of the Council of the EU in the Field of External Relations
Date: 18 September 2014
Location: T.M.C. Asser Instiuut
More Info: http://tinyurl.com/lxgl7va

International Conference: Deltas in Times of Climate Change
Date: 22 September 2014
Location: The Netherlands National UNESCO Commission in Rotterdam at the Beurs-WTC Congress & Event Center
More Info: http://tinyurl.com/n2f5cju

OPPORTUNITIES

Associate Appeals Counsel, (P-2), The Hague
International Residual Mechanism for Criminal Tribunals
Closing Date: 4 September 2014

Associate Information Analyst, (P-2), Juba
UN Department for Peacekeeping Operations
Closing Date: 4 September 2014

Associate Trial Lawyer, (P-2), The Hague
International Criminal Court
Closing Date: 21 September 2014

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or email:

iduesterhoeft@icty.org