ADC-ICTY Newsletter

ADC-ICTY Newsletter, Volume 1, Issue 6 10 December 2010

Head of Office Dominic Kennedy
Coordinator Ece Aygun
Contributors Niamh Barry, Habibatou Gani, Monisha Khandker, Taylor Olson, Jovana Parades

ICTY Cases

Cases in Pre-trial

Haradinaj et al. (IT-04-84)

Cases at Trial

Đorđević (IT-05-87/1)

Gotovina et al. (IT-06-90)

Karadžić (IT-95-5/18-I)

Perišić (IT-04-81)

Prlić et al. (IT-04-74)

Šešelj (IT-03-67)

Stanišić & Simatović (IT-03-69)

Tolimir (IT-05-88/2)

Župljanin and Stanišić (IT-08-91)

Inside this issue:

ICTY News

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

Prosecutor v. Šešelj (IT-03-67)

Vojislav Šešelj

In the trial of Vojislav Šešelj, the Chamber denied the request by the Prosecution during the public hearing of 2 November 2010, to lift the confidentiality of the redacted passages of the "Redacted Version of the 'Decision on Financing Defence', filed on 29 October 2010", filed publically on 2 November 2010 (respectively, "Public Decision of 2 November 2010" and "Request.")

The Chamber noted that under Article 20(1) of the Statute, by virtue of which the Chamber must ensure that the rights of the Accused receive full respect, the redactions made in the Public Decision of 2 November 2010 do not in any way prevent the public from fully understanding the logic followed by the Chamber. The Chamber also considered that the redactions made in the Public Decision of 2 November 2010 are justified by the imperative of respecting the confidential nature of certain information relating particularly to the private life of the Accused and those close to him.

An administrative hearing was held on Wednesday, 1 December 2010. The Presiding judge of the Trial Chamber delivered a number of oral decisions mostly granting the Prosecution's motion to admit into evidence documents tendered through the testimony of some Prosecution witnesses. During the hearing, Šešelj discussed the recent disclosure of secret documents on the Wikileaks website and suggested that there is a link between these documents, Mladic's diaries and the Rule 98*bis* hearing.

It is expected that a Rule 98*bis* hearing will be held in February or March. With regards to this hearing Judge Antonetti remarked that the only obstacle standing before the Rule 98*bis* hearing was the handwriting expert's report on the authenticity of Ratko Mladic's diary. Šešelj responded to this by reminding the court that his name was not mentioned in Mladic's diary and for that reason waiting for the handwriting expert's report was an unnecessarily delay to the trial.

In other news, on 29 November 2010, President Robinson assigned Judge Guney, Judge Pocar, Judge Vaz Judge Meron and Judge Morrison to an Appeals bench which will rule

ICTY Cases

Cases on Appeal

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

Popović et al. (IT-05-88)

Šainović et al. (IT-05-87)

on the Registrar's submission on the Trial Chamber's decision to partially fund Šešelj's Defence.

***Prosecutor v. Radovan Karadžić* (IT-95-5/18-I)**

Radovan Karadžić

In the trial of Radovan Karadžić, only one witness has testified in the last month, due to the temporary suspension of proceedings. This pause in proceedings was for the purpose of enabling Karadžić and his defence team to review over 14,000 pages of recently disclosed material. Court resumed proceedings on the 7 December 2010.

Karadžić recently filed a number of motions, pursuant to Article 29 and Rule 54*bis,* seeking binding orders against states and also non-state entities, including: the government of Iran, the United States, Venezuela, the United Nations and NATO.

Having received no response from the government of Iran to requests for co-operation, Karadžić filed his second motion for binding order on the 7 December 2010. The original motion had been rejected on the grounds that the request for documents was 'too broad and of questionable relevance'. The second motion is the result of further investigative efforts on the part of the defence team. It states that 'Karadžić's investigation has determined that on the 9 November 1994, Belgian arms dealer Jacques Monsieur, doing business as Matimco SPRL, received an order to supply 3000 205mm shells to the Bosnian Muslims via Croatia. On the 3 December 1994, Mosnieur signed a contract on behalf of his company, Matimco SPRL, with the Iranian Ministry of Defence (M.O.L.D.E.X) for the delivery of 3000 205mm shells… at Pula Airport.' Monsieur is currently serving a 23 month prison sentence in the United States for violation of the arms embargo with Iran *(United States v. Monsieur, CR 09-00186 [S.D. Alabama])*. Karadžić is requesting both the contract document and records of the three alleged shipments of arms.

In a second motion for binding order filed on the 7 December 2010, Karadžić seeks the following information from the United States of America: 'portions of the report of investigation conducted by the Intelligence Oversight Board in 1994-1995 concerning allegations of U.S. government personnel assisting in the supply of arms and ammunitions, and military equipment to the Bosnian Muslims at Tuzla in February-March 1995' and 'Transcript of U.S. Select House subcommittee deposition of Richard Holbrooke of September 27, 1996.' The United States has been co-operating with Karadžić and his requests for information since 2009. However, the present motion is a direct result of the refusal of the United States to furnish, specifically, the aforementioned documents. Karadžić deems this material as imperative to his case. Moreover, the Trial Chamber has already ruled that evidence of arms smuggling incidents in Tuzla is relevant and necessary. The motion outlines information from UNPROFOR and NATO personnel, which associates the United States with this particular alleged arms smuggling incident at a time when a UN Arms Embargo was in place.

Radovan Karadžić was the President of the three-member Presidency of Republika Srpska from its creation on 12 May 1992 until 17 December 1992, and thereafter sole President of Republika Srpska and Supreme Commander of its armed forces.

Šljivančanin Review Judgement - 10 years imprisonment

"The Appeals Chamber considers that the Prosecution's allegations that he [Panić] is biased are somewhat speculative."

- Appeals Chamber Review judgment dated 8 December 2010.

On 8 December 2010, the Appeals Chamber, Judge Meron presiding, vacated Veselin Šljivančanin's conviction for aiding and abetting murder, quashed his sentence of 17 years imprisonment and imposed a new sentence of 10 years. (See Volume 1, Issue 3, for a brief synopsis of the procedural background of the Tribunal's first Review Hearing).

Veselin Šljivančanin

Recalling its original judgement, dated 5 May 2009, the Appeals Chamber had imposed an additional conviction for aiding and abetting the murder of 194 prisoners of war at the hangar at Ovčara on 20 November 1991. The new conviction was based on circumstantial evidence surrounding a conversation between Šljivančanin and his then co-accused, Mile Mrkšić, during which, it was found, that Šljivančanin must have been informed that military protection, in the form of JNA (Yugoslav Peoples' Army) troops, had been removed from the prisoners at Ovčara. Judge Pocar, in his partial dissent, did not consider that the Appeals Chamber had the "power to impose a new sentence on the accused that is higher than that which was imposed by the Trial Chamber". At the Pre-Review Hearing, held on 3 June 2010, Miodrag Panić, a former JNA officer, testified that Šljivančanin was never informed about the withdrawal of JNA troops from Ovcara. During the Review Hearing, held on 12 October 2010, the Prosecution attacked the credibility of Panić. They also questioned his motive(s) for testifying, namely to exonerate himself from potential domestic prosecution.

Veselin Šljivančanin Profile

Major in the JNA; security officer of the 1st Guards Motorised Brigade and Operational Group South in charge of a military police battalion subordinated to the 1st Guards Motorised Brigade; after the fall of Vukovar, promoted to the rank of lieutenant colonel and placed in command of the Yugoslav Army (VJ) brigade in Podgorica, Montenegro.

Delivering its judgement, the Appeals Chamber determined that any allegations by the Prosecution, of bias on the part of Panić, were speculative and that in fact, Panić had done little to portray the JNA, himself and Šljivančanin in a favourable light. Nonetheless, Panić testified that, on the night of 20 November 1991, he was in a position to follow the conversation between Mrkšić and Šljivančanin. He attested that Mrkšić did not inform Šljivančanin about the withdrawal of the JNA troops from Ovčara. Thus, the Chamber found Panić credible vis a vis the conversation and his motives for testifying. As such, the 'new fact' was proven. As a result, the Chamber took the view that prior inferences drawn on the basis of previous facts, namely with regard to Sljivancanin's *mens rea*, were now rendered "untenable".

Šljivančanin remained relatively stoic, as did his and Prosecution counsel, as the new and reduced 10 year sentence was read. The reduction reflects the Chamber's view that the vacation of the murder conviction represented a significant reduction in Šljivančanin's culpability. Thereon concluded that credit spent in detention will be afforded.

Prosecutor v. Stanišić & Simatović (IT-03-69)


Stanišić (right) and Simatović (left)

On 30 November, 2010, the Prosecution withdrew its application under Rule 94*bis* with respect to the expert report authored by Christian Nielsen and Nena Tromp entitled "The Organisation of Internal Affairs Within the Serbian Entities in the Former Yugoslavia (1991 – 1995)." In the course of final preparations to call Christian Nielsen, the Prosecution discovered that chapters one ("Yugoslav Federations"), two ("Serbia") and three ("Serbian Krajina") of the Report were not authored by Christian Nielsen. Chapter One represented a composite of the work of Budimir Babovic and Nena Tromp. Chapter Three represented a composite of the work of Ari Kerkkanen and Nena Tromp. In addition, Chapter Two ("Serbia") of the Report was authored by Nena Tromp.

As such, the Prosecution determined that Mr. Nielsen would be unable to properly address challenges or answer questions regarding Chapters One - Three of the report. Mr. Nielsen is the primary author of Chapter Four of the Report dealing with issues related to the Ministry of Interior of Republika Srpska, and the Addendum filed on 18 September 2009. Therefore, he would only be able to answer questions on his chapter and the Addendum. Since Chapter Four was the least relevant to the case, the Prosecution took the decision to not call him as a witness and to withdraw its application under Rule 94*bis*.

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

Stojan Župljanin

Last week, a prosecution witness from Banja Luka gave evidence under the pseudonym ST-223 on adjudicated facts about the treatment of non-Serbs and the living conditions in the town. Witness ST-223 claimed that starting from 1992, Bosniaks who wanted to leave Banja Luka were required to sign a document referred to as the 'emigration paper' agreeing to leave all of their property and chattels to the Republika Srpska. In cross examination, defence counsel for Župljanin suggested that rather than transferring property rights, the 'emigration paper' merely enabled the Bosniaks to allow their property to be temporarily used. Župljanin's counsel also highlighted that prosecution witness ST-223 had been tried in his absence and sentenced to a term of imprisonment of 12 years for his membership in the Valter group, allegedly set up by the SDA, although the witness denied any ties with the organisation.

In other news, the Trial Chamber also granted Stanišić's motion for provisional release during the court's winter recess pursuant to Rule 65. The Trial Chamber noted that Stanišić had been granted provisional release on five previous occasions during the pre-trial phase and trial and has fully respected all the terms and conditions imposed by the court thereto. Similar motions have also been made by the defence teams of Ramush Haradinaj, Lahi Brahimaj, Jovica Stanisic and Franko Simatovic. Allowing provisional release for an accused during the festive season has attracted criticism in the past, notably from former chief prosecutor Carla Del Ponte who condemned the practice during her final press conference as chief prosecutor of the ICTY at The Hague in 2007.

News from International Courts and Tribunals

Mathieu Ngudjolo,

is the alleged former leader of Front des nationalistes et intégrationnistes (FNI)

International Criminal Court

- Mor Ndiaye, Visiting professional, Office of Public Counsel for the Defence, ICC

* The views expressed herein are those of the author(s) alone and do not necessarily reflect the views of the International Criminal Court.

The Prosecutor v. Germain KATANGA and Mathieu NGUDJOLO, Décision relative aux modalités de contact entre des victimes représentées et les parties (Decision on modes of contacts between the legal representatives of victims and the parties), 23 November 2010.

On 23 November 2010 in the case of the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II issued a decision on the modes of contact between the legal representative for the victims and parties. The Chamber referred to the real difficulties faced by parties and participants in making a decision, by mutual agreement, concerning the procedures for notifying the legal representatives of victims in advance in the event that one of the parties (Defence or Prosecution) comes into contact with victims, who have been admitted to participate in the proceedings. The Chamber therefore held that it was necessary to make a judicial determination in relation to the conduct of potential interviews, the presence of legal representatives during these interviews and a possible communication of documents prepared on that occasion. The Chamber then proceeded to state the legal framework concerning these issues and finally, defined the practical ways for these contacts.

Article 68(3) of the Rome Statute

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

In terms of the legal framework, the Chamber confirmed that Articles 1, 15.1 and Article 28 of the Code of Conduct apply to both Defence counsel and legal representatives of victims. In particular, under Article 28 of the Code of Conduct, "Counsel shall not address directly the client of another counsel except through or which the permission of that counsel". The Chamber noted however, that these Code of Conduct provisions should be interpreted in manner which is consistent with the Statute and Rules. The Chamber thus referred to Article 68(3) of the Rome Statute and Rules 89 to 93 of the Rules of Procedure and Evidence, which stipulate that the participation of victims in the proceedings must be consistent with the rights of the Defence.

The Chamber then sets out the following practical instructions concerning the guidelines for contact and interviews between a party and a legal representative of victims. The Chamber considered that a party who wants to interview a person designated as victim must first notify the victim's legal representative and the latter is bound to respect confidentiality obligations under the Code of Conduct, as is each member of his or her team. Secondly, Chamber considered that any interview can only take place if the victim has been duly informed and has agreed to grant the interview. If the victim decides to grant the interview, he or she can decide whether his/her legal representative should be present at the interview. If the legal representative is present at the interview, he or she is bound by the Code of Conduct in the sense that the legal representative must keep the contents of the interview strictly confidential and cannot use the information gained from the interview in the proceedings against the Defence. The Chamber held finally in the case where a party forgot to inform in advance a legal representative of victim, the party in question must advise the legal representative as soon as possible concerning the interview. If the legal representative of victim has been unable to obtain a copy of the victim's declaration (statement) or oral precision from the victim, he or she could ask the party for a copy of the statement or a summary in order to solve the lack of prior communication. The legal representative must respect the confidentiality of the statement/summary and can only use its contents for the purpose of providing legal advice to this specific victim-client.

The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Redacted Decision on the defence request for the admission of 422 documents, 17 November 2010.

-Amy DiBella, Intern, Office of Public Counsel for the Defence, ICC.

*The views expressed herein are those of the author alone and do not necessarily reflect the views of the International Criminal Court.

Thomas Lubanga is the alleged founder of Union des Patriotes Congolais (UPC) and the Forces patriotiques pour la libération du Congo (FPLC); alleged former Commander-in-Chief of the FPLC; and the alleged president of the UPC.

Thomas Lubanga

On 17 November, Trial Chamber I issued a decision on the admission of a number of defence documents from the bar table. According to the defence, these documents are likely to undermine the credibility of certain Prosecution witnesses and are thus relevant to the defense's abuse of process application.

The Chamber admitted transcripts of Prosecution interviews of witnesses made subsequent to their in court testimony. Rather than apply the rule on prior recorded testimony (Rule 68), the Chamber admitted the interviews under the provision of Article 69 for relevant evidence. The Chamber distinguished between these re-interviews not prejudicial to the Prosecutor who had originally requested and conducted the re-interviews and other interviews which the OTP had collected in the course of its investigation. The Chamber explained that the interviews of these witnesses, who had never been called to testify, would be of low probative value: their credibility and reliability had not been tested in front of the Court and it would be unfair to the Prosecution to admit them. Thus, if the defence sought to bring this evidence, it would have to call the relevant individuals as witnesses.

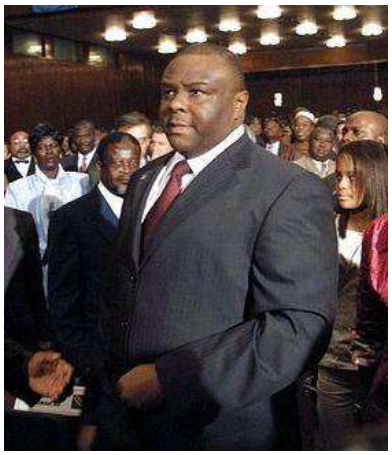
A number of additional documents were admitted. With regard to expenses of witnesses and intermediaries, the Chamber admitted certain invoices and official reimbursement receipts, noting that they carried sufficient indicia of reliability and were prima facie probative. Travel receipts, photocopies of primary school records to demonstrate a witness' age and a school document stating that a student had never been enrolled were also admitted.

The Chamber refused to admit a police report relating to a witness who had been arrested but not convicted noting that such reports do not prove lack of credibility. On the one hand the Chamber stated that the police report documents are "irrelevant to any substantive issue before the Court" but on the other, stated that it would be preferable for the witness to be given the opportunity to address this material during the course of his/her evidence (para. 83). The Chamber refused admission of certain documents based on concerns of reliability and fairness. However, it opened the door to a number of other documents and even suggested other manners to introduce the evidence which it had refused. As a result, the Defence may continue to develop the abuse of process issue.

Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III entitled "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence" of 28 July 2010.

Busingye Sylvia Mbabazi, Visiting Professional OPCD/ ICC

*The views expressed herein are those of the author alone and do not necessarily reflect the views of the International Criminal Court.



Jean-Pierre Bemba Gombo

Jean-Pierre Bemba Gombo is the alleged President and Commander-in-chief of the Mouvement de libération du Congo (Movement for the Liberation of Congo) (MLC). The trial commenced on 22 November 2010.

On Friday, 19 November, the Appeals Chamber of the International Criminal Court (ICC) reversed Trial Chamber III's decision of 28 July 2010 and directed Trial Chamber III to conduct a new review of the ruling on the detention of Jean-Pierre Bemba Gombo. Under Rule 118(2) of the Rules of Procedure and Evidence and Article 60(3) of the Rome Statute, the Chamber is obliged to review periodically (at least once every 120 days) their ruling on the accused's detention. In the impugned decision, the Trial Chamber had held that it was satisfied that there had been neither a material change of circumstances since the last review of detention, nor inexcusable delay attributable to the prosecution. The Trial Chamber therefore ruled that it was satisfied that the requirements of Article 58(l) (b) (r) of the Statute applied and decided that Mr Bemba was to remain in custody.

The first ground of Mr Bemba's Appeal was that the Trial Chamber had failed to conduct a thorough review of the information before it in order to be in a position to rule on the issue as to whether Mr Bemba's detention was still justified. In the appeal proceedings, the Appeals Chamber noted that Rule 118(1) states that the Chamber shall render its decision on detention after seeking the views of the Prosecutor. Moreover, the burden fell on the Prosecutor to demonstrate to the Chamber that there were no new circumstances which would impact on the Chamber's previous determination that the criteria for detention were. The Appeals Chamber therefore found that the Trial Chamber had failed to properly carry out such a periodic review, as it had restricted its assessment to the alleged new circumstances raised by the detained person and had not considered whether the Prosecution had met its burden of demonstrating that there were no new circumstances.

The second ground of appeal was that the Trial Chamber erred in dismissing as irrelevant Mr. Bemba's request for assistance from the Registry to obtain State guarantees of appearance. The Trial Chamber had held that since there had been no material change in circumstances since the last detention review, the defendant would not be released, and as such, the issue of State guarantees was irrelevant. The Appeals Chamber observed that the Defence had argued on appeal that the request for assistance was not irrelevant, as it could have aided the Defence to demonstrate a change in circumstances in future applications for provisional release. The Appeals Chamber explained the importance of the appellant's obligation to not only set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision. The Appeals Chamber also determined that the defendant had failed to identify how the alleged error could have had an impact on the impugned decision denying release, and as such, the applicant did not possess an automatic right of appeal in connection with this specific issue.

The third ground of a Appeal was that the Trial Chamber had erred in law by applying the regime concerning provisional release (articles 58 (1) (b) and 60 (3) of the Statute) to the defendant's request to be detained in a safe house or released on weekends, as this should be been characterised as a request for a modification of his detention regime. The Appeals Chamber held that the Trial Chamber could not be faulted for treating the alternative request (safe house/weekend release) as a request for conditional weekend release, as his application to the Trial Chamber had not been clearly framed as a request for modification of the detention regime.

Blog Update

- Elli Goetz, ICC Prosecutor to file cases on Kenya violence, 2 December 2010, available at: http://www.internationallawbureau.com/blog/?p=2035
- Deirdre Montgomery, ICTY President Robinson & Prosecutor Brammertz address Security Council on Completion issues, 8 December 2010, available at: http://www.internationallawbureau.com/blog/?p=2064
- Elli Goetz, ICC Prosecutor looking into possible war crimes in Korea, 8 December 2010, available at: http://www.internationallawbureau.com/blog/?p=2068

Publications

Books

Ed. Terry Gill and Dieter Fleck, The Handbook of the International Law of Military Operations, Oxford University Press, 2010.

David L. Nersessian, Genocide and Political Groups, Oxford University Press, 2010.

Articles

Geoffrey Corn, Mixing Apples and Hand Grenades The Logical Limit of Applying Human Rights Norms to Armed Conflict, Journal of International Humanitarian Legal Studies, Volume 1, Number 1, October 2010 , pp. 52-94(43)

Ralph Riachy, Trials in Absentia in the Lebanese Judicial System and at the Special Tribunal for Lebanon: Challenge or Evolution?, Journal of International Criminal Justice (2010) 8(5): 1295-1305 doi:10.1093/jicj/mqq073

The International Criminal Court (ICC) chief prosecutor said he would file cases against six Kenyans by Dec. 17 following the conclusion of investigations into the country's post-election violence.

Opportunities

Associate Legal Officer, The Hague (P-2)
International Criminal Tribunal for Rwanda (ICTR)
Registry - Judicial Support Services Division
Closing Date: Saturday, 22 January 2011

Legal Officer (P4)
Special Tribunal for Lebanon
Chambers/Trial Chamber
Closing date: 15 December 2010

Senior Legal Officer/First Secretary of the Court (P5)
Department of Legal Matters
International Court of Justice
Closing date: 15 December 2010

Program Director
The Coalition for the International Criminal Court (CICC)
Closing date: 15 December 2010

HEAD OF OFFICE

ADC-ICTY

ADC-ICTY
Churchillplein 1
2517 JW The Hague
Room 085.087

Phone: +31-70-512-5418
Fax: +31-70-512-5718
E-mail: dkennedy@icty.org

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

WE'RE ON THE WEB!

WWW.ADCICTY.ORG

Upcoming Events

- **ICDL Annual Meeting 2011**

Date: 22 January 2011
Organiser: International Criminal Defence Lawyers - Germany (ICDL)
Venue: Hotel InterContinental in Berlin

On 22 January 2011, the ICDL will hold its fifth Annual Meeting at the Hotel InterContinental in Berlin. Confirmed speakers include Prof. Otto Triffterer, Peter Robinson, Sam Shoamanesh, Fiona McKay and David Hooper. Four of the five keynote speakers will hold their presentations in English language. Further information is available on ICDL's German website: http://www.icdl-germany.org/3.html.

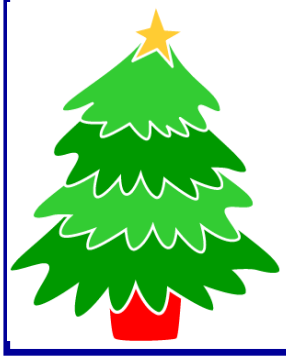
- **Common Civility: International Criminal Law as a Cultural Hybrid**

Date: 28 January 2011 - 29 January 2011
Time: 10:00 - 13:00
Organiser: T.M.C. Asser Instituut, Amsterdam Centre of the Inter-disciplinary Research on International Crimes (ACIC) and Institut für Kriminalwissenschaften
Venue: T.M.C. Asser Instituut, R.J. Schimmelpenningcklaan 20-22, The Hague

The main objective of the conference is to explore the common law-civil law (adversarial-inquisitorial) dichotomy at the international tribunals, exploring how it affects their daily functioning, the tensions which arise from combining different legal traditions, and to discuss how such tensions may be resolved

Goodbye and Thanks...

Special thanks to Ece Aygun, Assistant to the Head of Office, who has worked tirelessly on the newsletter over the past few months. Ece is leaving the Association of Defence Counsel at the end of the month but has being a key member of the newsletter team and will be missed.



Season's Greetings

On behalf of the Association of Defence Council Practicing Before the International Criminal Tribunal for the Former Yugoslavia and the Newsletter team, we wish you a safe and happy holiday season and hope for a prosperous year in 2011.