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## ICLS Newsletter II/ 2007

- Update on events at the ICTY
- Under auspices of International Justice: Some Notes about The Hague Academy of International Law Seminar for Professionals
- Upcoming event: MICC University at its second edition
- Summer Programs

**Dear all,**

Welcome to this second edition of the ICLS newsletter in 2007. Just like in the first edition, we would like to provide you with an update of interesting developments in international criminal law. We would like to encourage you to participate in the redaction of future updates to allow us to provide the most complete overview of developments possible. So please do not hesitate to contact us, should you come across an interesting topic that you would like to write about!

The **next meeting of ICLS** will take place in the restaurant "Honigmond", Tieckstrasse 12 (corner Borsigstrasse), 10115 Berlin, Germany, on

*Sunday, 24 June 2007 at 10 a.m.* You are cordially invited to the meeting.

Nikola Gillhoff  
Susen Jaeger  
Matthias Neuner  
-Executive Board-

### **UPDATE ON EVENTS AT THE ICTY**

*by Tatjana Maikowski\**

**To start with some updated key figures:**

161 persons were indicted before the Tribunal. The Tribunal has concluded proceedings against 107 accused, with 52

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\* Member of ICLS; Legal Officer at the International Criminal Tribunal for the Former Yugoslavia (ICTY).

accused having been sentenced, five acquitted, 14 referred to national jurisdictions and 36 deceased or having had their indictments withdrawn.

Proceedings against 54 accused are ongoing, with 10 accused before the Appeals Chamber, 25 at trial, 10 at pre-trial stage, four awaiting judgement and 5 accused at large.

### **Cases before the trial Chambers:**

Six trials are running concurrently before the Trial Chambers against: Prlić et al.; Milutinović et al.; Popović et al.; Dragomir Milošević; Ramush Haradinaj et al.; and Ljube Bošković et al. The case against Milan Martić was closed on 12 January 2007; the case against Mile Mrkšić et al. was closed on 16 March 2007. The Accused are awaiting their Judgement.

Zdravko Tolimir, a high ranking Bosnian Serb Army officer indicted for genocide and other crimes committed in Srebrenica in 1995, was transferred into the Tribunal's custody on 1 June and will have his initial appearance on 4 June 2007. He was detained by authorities in Bosnia and Herzegovina on 31 May 2007 after having been on the run for more than two years.

### **Brđanin Appeal Judgement**

On 3 April 2007, the Appeals Chamber of the ICTY rendered its Judgement in the case *The Prosecutor v. Radoslav Brđanin* (IT-99-36-A).<sup>1</sup>

The indictment in this case charged Brđanin with a range of crimes committed between April and December of 1992 in Bosnia Herzegovina, and particularly in the Autonomous Region of Krajina (also known as the "ARK"). During this time, Brđanin held various positions in the ARK, including serving as the President of the ARK Crisis Staff and later of its successor body, the ARK War Presidency.

In its Judgement of 1 September 2004, Trial Chamber II convicted Brđanin pursuant to Article 7(1) of the Statute of the Tribunal for:

- persecution as a crime against humanity (Count 3), incorporating torture as a crime against humanity (Count 6), deportation as a crime against humanity (Count 8), and inhumane acts (forcible transfer) as a crime against humanity (Count 9);
- wilful killing as a grave breach of the Geneva Conventions (Count 5);
- torture as a grave breach of the Geneva Conventions (Count 7);

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<sup>1</sup> *Brđanin* Judgment ; for a summary see <http://www.un.org/icty/pressreal/2007/pr1151e-summary.htm>.

- wanton destruction of cities, towns or villages, or devastation not justified by military necessity as a violation of the laws or customs of war (Count 11);
- and destruction or wilful damage done to institutions dedicated to religion as a violation of the laws or customs of war (Count 12).

The Trial Chamber found Brđanin not guilty of the crimes of:

- genocide (Count 1);
- complicity in genocide (Count 2);
- extermination as a crime against humanity (Count 4);
- and unlawful and wanton extensive destruction and appropriation of property not justified by military necessity as a grave breach of the Geneva Conventions (Count 10).

Trial Chamber II sentenced Brđanin to a single sentence of 32 years' imprisonment. Both the Prosecution and Brđanin appealed the judgement. The Appeals Chamber reduced the sentence to 30 years' imprisonment.

This news letter will not address all issues raised on appeal, but instead highlight those issues which deal with the applicable law.

Brđanin raised certain challenges to his conviction for persecution. The Trial Chamber had found him guilty of aiding and abetting the crime of persecution with respect to the following acts: wilful killing; torture; destruction of property and religious buildings; deportation and forcible transfer; physical violence; rapes; sexual assault; constant humiliation and degradation; denial of the right to freedom of movement; and denial of the right to proper judicial process. The Trial Chamber had also found that Brđanin instigated the crime of persecution with respect to deportation and forcible transfer and ordered the crime of persecution with respect to the denial of the right of employment.

Brđanin argued that, as a matter of law, certain types of conduct (that is: acts of physical violence; the denial of the right to employment; and the denial of the rights of freedom of movement and proper judicial process) fall outside the jurisdiction of the Tribunal because they do not rise to the level of "serious violations" of international humanitarian law.

In this regard, the Appeals Chamber recalled that the underlying acts of persecution could include acts, which are listed as crimes under Article 5 of the Statute, or under other articles of the Statute, as well as acts, which are not

considered a crime in international law<sup>2</sup>. For acts not enumerated as a crime in the Statute to amount to the crime of persecution pursuant to Article 5(h) of the Statute, they must be of equal gravity to the crimes listed in Article 5 of the Statute, whether considered in isolation or in conjunction with other acts. The Appeals Chamber thereby reaffirmed its findings in the Judgements in the Kvočka<sup>3</sup>, the Naletilić and Martinović<sup>4</sup> and the Simić<sup>5</sup> cases.

The Prosecution raised four grounds of appeal out of which we will briefly discuss the first two, which concern the definition of the mode of liability of joint criminal enterprise (JCE). In Ground 1 of its Appeal, the Prosecution challenged the Trial Chamber's implicit finding that the principal perpetrators of a crime - that is, the individuals who actually carry out the *actus reus* of the crime - must be members of the JCE for any convictions via JCE to attach with regard to those crimes. In Ground 2 of its Appeal, the Prosecution challenged two legal holdings of the Trial Chamber: first, the holding that there must be an agreement or understanding between the accused and the principal perpetrator for the accused to be convicted via JCE; and, second, that

<sup>2</sup> *Brđanin* Judgment, par. 292-297.

<sup>3</sup> *The Prosecutor v. Kvočka et al.*, case no. IT-98-30/1, Appeals Judgment, 28 February 2005, par. 321-325.

<sup>4</sup> *The Prosecutor v. Naletilić and Martinović*, case no. IT-98-34, Appeals Judgment, 3 May 2006, par. 572-575.

<sup>5</sup> *The Prosecutor v. Simić et al.*, case no. IT-95-9, Appeals Judgment, 28 November 2006, par. 177.

JCE is applicable only to enterprises smaller than the one alleged in the Brđanin case.

The Appeals Chamber granted both grounds of appeal with regard to the questions of law. It held that what matters in a first category JCE is not whether the person who carried out the *actus reus* of a particular crime is a member of the JCE, but whether the crime in question forms part of the common purpose<sup>6</sup>. The Appeals Chamber found that to hold a member of a JCE responsible for crimes committed by non-members of the enterprise, it has to be shown that the crime can be imputed to one member of the joint criminal enterprise, and that this member - when using a principal perpetrator - acted in accordance with the common plan. The existence of this link is a matter to be assessed on a case-by-case basis<sup>7</sup>. The Appeals Chamber further reversed the Trial Chamber's finding that there has to be an understanding or an agreement to commit a particular crime between the physical perpetrator and the Accused, in order to hold the Accused criminally responsible for this crime pursuant to the first category of JCE<sup>8</sup>. Finally, the Appeals Chamber agreed with the Prosecution that the Trial Chamber erred in concluding that the mode of liability of JCE is not

<sup>6</sup> *Brđanin* Judgment, par. 410 and 418 at the end.

<sup>7</sup> *Brđanin* Judgment, par. 413.

<sup>8</sup> *Brđanin* Judgment, par. 419.

appropriate for cases as large as the one at hand<sup>9</sup>.

In light of the concerns raised by the Association of Defence counsel and Brđanin, the Appeals Chamber emphasized in its conclusions that JCE is not an open-ended concept that permits convictions based on guilt by association<sup>10</sup>. It is interesting to note what the Appeals Chamber stated with regard to the participation of the Accused in the furtherance of the common plan. Although his contribution to the crimes for which he is found responsible need not be necessary or substantial, it should at least be a significant contribution.

If all elements are met, the members of the JCE are held responsible not only for their own contributions to the furtherance of the common goal, but also for the actions of their fellow members. This approach does not permit formal distinctions between JCE members who make overwhelmingly large contributions and JCE members whose contributions, though significant, are not as great. According to the Appeals Chamber, such disparity is adequately dealt with at the sentencing stage<sup>11</sup>.

Although the Appeals Chamber dealt with the JCE doctrine in some detail, it

<sup>9</sup> *Brđanin* Judgment, par. 425.

<sup>10</sup> *Brđanin* Judgment, par. 429 and 430.

<sup>11</sup> *Brđanin* Judgment, par. 432.

unfortunately omitted to define the link that has to be established between the members of a JCE and physical perpetrators who are not members of the enterprise. It used the terms "impute" and "use", without further explanation. According to the Appeals Chamber, the existence of this link is to be established on a case-by-case basis. It remains to be seen how different Trial Chambers will interpret this link.

### **Appeals Chamber Decision on Krajišnik's request to self-represent himself on appeal**

On 11 May 2007, the ICTY Appeals Chamber rendered its decision in the case *The Prosecutor v. Momčilo Krajišnik*<sup>12</sup>. With a reference to the Milošević case, the latter requested to be permitted to self-represent himself on appeal. He argued that there is no reason why the right to self-representation on appeal at the ICTY should be understood differently from the right to self-representation during trial proceedings.

The Appeals Chamber granted his request. It recalled its discussion of self-representation in the Milošević and Šešelj cases<sup>13</sup>. Therein, the Appeals Chamber

<sup>12</sup> *The Prosecutor v. Momčilo Krajišnik*, case no. IT-00-39-A, Decision on Momčilo Krajišnik's request to self-represent, on counsel's motions in relation to appointment of *Amicus curiae*, and on the Prosecution motion of 16 February 2007 (Krajišnik Decision).

<sup>13</sup> *The Prosecutor v. Slobodan Milošević*, case no. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial

had interpreted article 21 (4)(d) of the Statute of the Tribunal as a guarantee of the right of self-representation. It had concluded that defendants before the Tribunal have the presumptive right to represent themselves notwithstanding a Trial Chamber's judgement that they would be better off if represented by counsel. This right is qualified and may be curtailed, but only on the grounds that a defendant's self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial.

After recalling these principals, the Appeals Chamber considered whether they should also apply to persons during the appeal stage. It held that there is no textual basis nor an obvious reason why self-representation at trial is so different in character from self-representation on appeal as to require a distinction between the two. It also conducted a review of domestic case law and found that those jurisdictions that recognize the right to self-representation at trial also do so on appeal (with the exception of the United States).

Krajišnik had further asked that the Appeals Chamber assign *amici curiae* (friends of the court) to assist in ensuring

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Chamber's Decision on the Assignment of Counsel, 1 November 2004; *The Prosecutor v. Vojislav Šešelj*, case no. IT-03-67-AR73.3, Decision on Appeal against the Trial Chamber's Decision on Assignment of Counsel, 20 October 2006.

the fairness of the proceedings. The Appeals Chamber held that as part of the choice to self-represent, Krajišnik must accept the responsibility for the disadvantages this choice may bring and that he is not entitled to *amicus curiae*. However, the Appeals Chamber then went on to say that the appointment of *amicus curiae* under Rule 74 of the Rules of Procedure and Evidence is warranted in order to ensure that the appeal is fair. It seems to have based this decision on the fact that Krajišnik is the first defendant seeking to self-represent himself on appeal<sup>14</sup>. It invited the participation of an *amicus curiae* to assist the Appeals Chamber by arguing in favour of Krajišnik's interests<sup>15</sup>. While, the *amicus curiae* is to work independently from Krajišnik and is not considered a party to the proceedings, it is to make submissions to the Appeals Chamber similar to those which a party would make, to attend status conferences, to appear at the oral appeal hearing and to have access to all *inter partes* confidential material in the case<sup>16</sup>.

It should be noted that the President, Judge Fausto Pocar, dissented because he disagreed with the majority's decision to appoint *amicus curiae* to act as *de facto* counsel. Judge Schomburg dissented both with regard to the right to self-

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<sup>14</sup> Krajišnik Decision, par. 18.

<sup>15</sup> Krajišnik Decision, par. 19.

<sup>16</sup> Krajišnik Decision, par. 19-21.

representation (on trial and appeal) and with regard to the assignment of *amicus curiae*. Judge Shahabuddeen attached a separate opinion supporting the view that an appellant has a right to self-representation on appeal.

**UNDER AUSPICES OF**  
**INTERNATIONAL JUSTICE:**  
**Some Notes about The Hague**  
**Academy of International Law**  
**Seminar for Professionals**

by Rakhmadjon Sobirov<sup>\*</sup>

The third seminar for professionals held at The Hague Academy of International Law ([www.hagueacademy.nl](http://www.hagueacademy.nl)) was a unique 10-day academic experience for those who were interested in issues related to international and organized crimes and ways to combat them. Twenty-five professionals, academics, civil servants, lawyers and researchers gathered in The Hague from 18<sup>th</sup> till 28<sup>th</sup> of March 2007 to learn more and discuss "*International Security Law: The Fight Against International Crimes, Terrorism and Organized Crimes*".

This Seminar for advanced studies in public and private international law for professionals is an annual event organized

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<sup>\*</sup> Member of the International Criminal Law Society; B.A., M.A.; former Law Clerk at Legal Advisory Section of the Office of the Prosecutor of the International Criminal Court; Freelance Researcher in Uzbekistan.

by The Hague Academy to provide a flexible framework for advanced study in different branches of international law. Focusing on contemporary developments in international law, the Seminar aims to give answers to challenging questions of our times.

Diplomats, police officers, researchers and lawyers from twenty five different countries had fruitful discussions on challenges before international community, which is trying to combat crimes that go beyond national borders and threaten well-being of several countries. Held in the City of Peace and Justice, the Seminar hosted such renowned practitioners of international law as, Judge Claude Jorda and Senior Legal Officer Mr. Gilbert Bitti of the International Criminal Court; former Officer-in-Charge of the United Nations Office on Drugs and Crime Prevention, Professor Jan van Dijk; Representative of the Ministry of Interior of Algeria Mr. Farid Bencheikh and many other professionals whose daily activities were involved with fighting international and organized crimes.

The participants also have paid a visit to the International Criminal Court and learnt more about the Court and cases before it directly from Judge Song Sang-Hyun who kindly gave an informative speech. During the visit Assistant Investigator of the

Office of the Prosecutor also gave a brief outline of cases and situations under consideration by the Office and challenges faced in investigating them.

Having had a chance to participate in this intensive seminar, I have learnt more about crimes with an international dimension, which do not necessarily fall under the jurisdictions of international courts or tribunals. This seminar demonstrated that fighting such crimes warrants cooperation not only on inter-governmental or international levels, but also requires close collaboration among the members of the academia, who debate on many issues pertinent to legal aspects of the crimes; non-governmental institutions that can lobby governments to ratify necessary legal instruments and media that can highlight the problems and raise the awareness of general public.

In short, the Seminar has been one step forward in understanding the complexities of investigating international crimes and given me more 'food for thought' regarding how international community could adopt effective methods in intercepting such crimes.

### **Upcoming Event:**

## **MICC UNIVERSITY AT ITS SECOND EDITION -**

*by Andreea Pavel\**

When MICC University (or Model-International Criminal Court University) opened its gates to 45 European students for the first time in November last year, it became the first simulation of the International Criminal Court in Europe to be held on a yearly basis. MICC makes a contribution towards the promotion of humanitarian law in theory and practice among students in Europe and beyond. It does so by uniquely combining a simulation of the International Criminal Court with trainings and seminars, as well as discussions on the development and current dilemmas in the field. The project offers participants with various backgrounds an opportunity to reflect upon massive human rights infringements in different social-political contexts and to exchange views on contemporary instruments and modalities for human rights protection. Moreover, participants are offered an opportunity to learn about human rights reporting from experienced journalists and develop their reporting competencies on humanitarian law topics by practicing during the simulation. The most precious resource of the MICC is thus the great diversity of its participants and

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\* Member of ICLS, Co-ordinator of the Kreisau Initiative Berlin e.V., one of the main organisers of the Model-ICC.



the energetic exchange of ideas on the symbolic Krzyżowa estate.

The MICC is organized by the Kreisau-Initiative Berlin e.V. in cooperation with the Krzyżowa Foundation for Mutual Understanding and is greatly supported by the Foundation "Remembrance, Responsibility and Future" and the International Criminal Law Society.



On November 7-11 this year, fifty university students from all regions of Europe and beyond will be brought together in Krzyżowa for the event. MICC targets specifically students of law / international relations and journalism.

### **Application Process**

The application for MICC University in November 2007 is a two-step process: first, interested students are asked to register on the MICC website: [www.model-icc.org](http://www.model-icc.org). They can register in teams of four for the prosecution, defence and counsel of victims roles in the simulation (legal teams) or alone for the judge role or for the press team. As a second step, the legal teams are required to submit written position papers solving the issues of either the Pre-Trial or Trial proceedings. *The position papers are due June 24<sup>th</sup>*. The simulation case, together with the trial

issues and preparation material, are available online. The selection of the participants is made by mid-July on the basis of the position papers (legal teams), or the CVs/ articles for the judges and press team members. For more information material on the MICC – Flyer, poster, MICC presentation film – please do not hesitate to contact the organizers at [loewe@kreisau.de](mailto:loewe@kreisau.de).

### **About Krzyżowa**

Krzyżowa/Kreisau is the former meeting place of one of the most important resistance groups to the WWII totalitarian regime, the Kreisau Circle. At the risk of their lives, the members of the Kreisau Circle met here during 1942-43 under the leadership of Helmuth James von Moltke, the owner of the Krzyżowa estate, and developed plans for the democratic reconstruction of Germany after WWII. Among others, the Kreisau circle also discussed the necessity to punish Nazi crimes through an international criminal court. Helmuth James von Moltke himself made efforts as an international lawyer to interpret the hitherto existing laws of war as to limit damaging war measures, among others regarding commercial and sea warfare. His efforts were directed towards relieving the lot of POWs who were to be used as forced labour or summarily executed. Through his engagement as a lawyer and his leadership of the Kreisau

Circle, Helmuth James von Moltke was a strong voice in the call for peace and respect for human rights. The Kreisau-Initiative Berlin e.V. and the Krzyżowa Foundation for Mutual Understanding today work jointly to pass the legacy of the Kreisau Circle on to a new generation and to promote a peace- and respectful togetherness of people in Europe and beyond.

## **SUMMER PROGRAMS**

### **Summer Course on International Humanitarian Law**

**Organizer:** International Institute for Humanitarian Law

**Date and Location:** June 19- July 2, Sanremo, Italy

**Link:**

<http://web.iihl.org/site/5442/default.aspx>

### **Summer School on International Criminal Law**

**Organizer:** Grotius Centre of International Legal Studies / Campus The Hague / University Leiden

**Date and Location:** June 25 – July 6, 2007, The Hague, the Netherlands

**Link:**

<http://www.grotiuscentre.org/com/doc.asp?DocID=276>

### **Within the Interest of Justice:**

#### **Complementarity in International Law**

Marie Curie Top Summer School on International Criminal Law

**Organizer:** Grotius Centre of International Legal Studies / Campus The Hague / University Leiden

**Date and Location:** 25 June – July 6, 2007, the Hague, the Netherlands

**Link:**

<http://www.grotiuscentre.org/com/doc.asp?DocID=333>

#### **Summer Course in Private and Public International Law**

**Organizer:** The Hague Academy of International Law

**Date and Location:** July 2 – August 10, the Hague, the Netherlands

**Link:**

<http://www.hagueacademy.nl/index.php>

#### **Summer Programme in International Human Rights Law**

**Organizer:** University of Oxford and George Washington University Law School

**Date and Location:** July 1 - 28, Oxford, UK

**Link:**

<http://www.conted.ox.ac.uk/courses/international/summerprogrammeininternationalhumanrightslaw.asp>

### **Summer Course Human Rights**

**Organizer:** Netherlands School of Human Rights Research, the Catholic University of Leuven and Northwestern University of Chicago

**Date and Location:** August 20-31, the Hague, the Netherlands & Leuven, Belgium

**Link:**

<http://www.uu.nl/uupublish/homerechtsgleer/onderzoek/onderzoekscholen/rechtenvandedemens/english/summercourse/22876main.html>

### **Salzburg Law School on International Criminal Law, Humanitarian Law and Human Rights Law**

**Organizer:** Institute for Criminal Law, Criminal Procedure and Criminology / Paris-Lodron-University Salzburg

**Date and Location:** August 5-17, 2007, Salzburg, Austria

**Link:**

<http://www.sbg.ac.at/salzburglawschool/>

### **Summer School on International Humanitarian Law (in German)**

**Organizer:** German Red Cross

**Date and Location:** August 5-11, 2007, Berlin, Germany

**Link:**

<http://www.drk.de/voelkerrecht/index.html>

### **Tensions in the Law of Treaties**

Helsinki Summer Seminar on International Law

**Organizer:** Erik Castrén Institute of International Law and Human Rights, in co-operation with Faculty of Law at the University of Helsinki and the Centre of Excellence in Global Governance Research

**Date and Location:** August 20-31, 2007, Helsinki, Finland

**Link:**

<http://www.helsinki.fi/eci/Events/summerseminar07.htm>