## Interest Group on

# International Organizations

### The American Society of International Law

**Fall 1997 Newsletter**

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**A Message from the Chair**

I am pleased to take over from Michael Schechter as Chair of the ASIL International Organizations Interest Group. For those of you who don't know me, let me begin by telling you a little bit about my background. I served previously as Attorney-Adviser for U.N. Affairs at the U.S. Department of State and as a member of the U.S. delegations to the U.N. General Assembly and the Commission on Human Rights. While in Washington, I also served as Chairman of the International Law Section of the District of Columbia Bar. I am currently a faculty member and Director of the Center for International Law and Policy at the New England School of Law.

Our interest group has over 400 members from the United States and several other countries, making us one of the largest of the ASIL's interest groups. I would also like us to become one of the most active of the interest groups. Thus, the officers of our group (Vice Chair Paul Williams, newsletter editor Bryan MacPherson and I) have put together an ambitious program for 1997-1998. In October 1997, we will be co-sponsoring an international conference in Boston about the China/Taiwan situation (including the issue of U.N. membership); in April 1998, we will be hosting a ninety-minute panel at the Annual Meeting of the American Society of International Law; we've created an Internet website at: www.nesl.edu/center/asil.htm; and we will be sending you another newsletter in the Spring of 1998. In addition, we've established several subcommittees, chaired by members of our group, which will be organizing and co-sponsoring activities in their subject matter areas. They are:

(1) NGOs and the UN (Chaired by Neri Sybesma-Knol of Free University of Brussels)

(2) International Criminal Courts (Chaired by John Washburn and Steven Gerber of the Washington Group on an International Criminal Court)

(3) Work of the International Law Commission (Chaired by Greg Fox of NYU School of Law);

(4) International Conferences (Chaired by Michael Schechter); and

(5) The International Court of Justice (We need a volunteer to Chair this Subcommittee).

If you have any questions or comments, or want to be a member of one of these committees or play a more active role in our interest group, please contact me at:
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**The Train Keeps Rolling --**

**But Will the ICC Be Derailed?**

**Steven Gerber**

The August session of the Preparatory Committee (PrepCom) for the Establishment of an International Criminal Court (ICC) continued the momentum towards the establishment of an ICC. Over 130 countries participated in the negotiations and more than 50 representatives from non-governmental organizations (NGO), participants in the NGO Coalition for an International Criminal Court (CICC), attended the PrepCom. The work of the PrepCom was split into two working groups, one dealing with procedural matters and the other dealing with complementarity and the trigger mechanisms. Overall, progress was made in the PrepCom, but there were some issues which remained unresolved.

The working groups attempted to draft text of a statute that could then be submitted in treaty form to a diplomatic conference for signature. Unfortunately, most of the articles that previous working groups have debated ended up with brackets around text, indicating that the text is a proposal that lacks consensus. The more brackets, the less likely a diplomatic conference will be able to finalize a treaty.

**Complementarity:** Working Group Three (working groups one and two dealt with issues during the February PrepCom) dealt with both complementarity and trigger mechanisms. Complementarity is the general idea that the ICC will not supersede national courts, but rather complement them. Although, complementarity is a concept that permeates the ICC draft statute, article 35, Issues of Admissibility, is the main article to deal with complementarity. Surprisingly, the working group succeeded in drafting an article without brackets and which will allow the ICC to be effective. Although several states insisted on including a special note that preserves other possible positions on article 35, an unbracketed complementarity article that enjoys widespread support is a key building block for other parts of the statute.

**Trigger Mechanisms:** Working Group Three also worked on trigger mechanisms for the court, specifically articles 21 through 25. These articles, unfortunately, retain many brackets surrounding text. In some cases, entire articles are bracketed. There are still several important decisions to be made before many of these brackets can be removed. Will the prosecutor be able to initiate cases on his or her own initiative or will only states party to the treaty and the U.N. Security Council be allowed this power? Will there be a complicated state consent regime or will states accept the jurisdiction of the court by virtue of their ratification of the treaty? Will they Security Council be able to block cases arising from situations it is dealing with under its Chapter VII authority?

These questions remain to be answered. There was a compromise proposal by Singapore dealing with the Security Council's ability to block cases. Singapore's proposal would allow the Security Council to block cases in Chapter VII situations, but would change the assumption of the ILC draft statute. Instead of the cases going to the Security Council first and requiring an affirmative Security Council vote to forward to the ICC, which would be subject to the veto of the permanent five members (P5) of the Security Council, cases would go to the ICC first and the Security Council would have to take an affirmative vote to block the case and this blocking would, of course, be subject to the veto of any of the P5. Unfortunately, two of the P5, the United States and France, refused to even consider the Singapore

compromise.

**Procedural Matters:** Working Group Four dealt with procedural questions. In the first session, several delegations were able to introduce an Abbreviated Compilation of Proposals that had consolidated many of the proposals in vol. II of the PrepCom Report. This shorter document became the basis for discussions of Working Group Four. The issues addressed were notification of the indictment, trials in absentia, admissions of guilt, investigations of alleged crimes, functions and powers of the trial chamber, commencement of prosecution, rights of the accused, and protection of the accused, victims and witnesses.

Unfortunately, progress was extremely slow the first week. Although the work accelerated the second week, the working group was unable to address all the articles in its workplan and those articles that were discussed still contain either brackets or alternative options. How to accommodate the procedures and/or preferences of different legal systems into one international court remained a problem. Several delegations proposed as a solution that the statute contain only general principles of procedure. Detailed rules would be written, at a later date, by the judges and approved by the states. Many delegations agreed with this proposal, but found it difficult to reorient the negotiating process.

**Conclusion:** Although many issues remain unresolved, the PrepCom made progress towards the establishment of a permanent ICC. The drafting of article 35 which outlines the bases of complementarity is an essential building block which will allow other aspects of the court to be fleshed out in future PrepComs. The next PrepComs are scheduled for 1-12 December 1997 and for March-April 1998. The December PrepCom will be used to finish the unfinished work from the four working groups in February and August, such as general Principles of Criminal Law, Penalties, Definitions of Crimes and for the untouched topic of Cooperation between the ICC and States. The Diplomatic Conference is scheduled for June 1998 in Rome and unofficial word is that it will last five weeks. Although the momentum is still moving forward, there remains a lot to do in the next year.

The NGO Coalition for an ICC maintains web pages containing information and documents about the proposed ICC: **http://www.igc.apc.org/icc**, and the Tribunals for the former Yugoslavia and Rwanda: **http://www.igc.apc.org/tribunal**.

**Yugoslavia Tribunal Issues First Judgment and**

**Sentence**

**Michael Scharf**

The verdict in the first international war crimes trial since World War II was handed down on May 7, 1997, exactly a year to the day the historic trial commenced before the recently established United Nations International Criminal Tribunal at The Hague.[1] The defendant, Dusko Tadic, a Bosnian-Serb cafe owner, karate instructor and part-time traffic cop, stood trial on thirty-one counts of grave breaches of the Geneva Conventions, violations of the laws and customs of war, and crimes against humanity related to the torture and murder of Moslems at the Serb-run Omarska, Karaterm and Trnopolje prison camps in northwestern Bosnia, and the nearby villages of Kozarac, Jaskici and Sivci during the summer of 1992. 125 witnesses testified during the seven month-long trial, during which 400 exhibits were introduced into evidence.[2]

The trial produced a mixed verdict: Tadic was convicted on eleven counts (a general persecution count and ten specific counts involving beatings) and acquitted on 20 counts. The acquittals on 11 counts resulted because two of the three judges held that the grave breaches provisions of the Geneva Conventions of 1949 were inapplicable, since the Bosnian Serbs were merely the allies, not the agents, of authorities in Serbia. With respect to the acquittals on other the counts (including all nine of the specific murder charges), the three judges unanimously found the evidence insufficient for a conviction, although they said they were not persuaded by Tadic's alibi defense. On July 14, 1997, the Trial Chamber sentenced Tadic to 20 years imprisonment.[3] Both the defendant and the Prosecutor have appealed the Judgment. A decision on the appeal is expected in 1998.

The Judgment amounts to 301 pages, with a dissenting opinion of nineteen pages. There are also thirty pages of annexes consisting of the indictment, a map of Bosnia, photos of the model of the Omarska prison camp, photos of the Hangar building at Omarska, photos of the Keraterm and Trnopolje camps, and a photo of an inscription on a wall of a cell at the Omarska camp. The Judgment begins with factual findings about the conflict in Bosnia and the role of the accused in atrocities committed there. The Judgment then analyzes the applicable law and sets forth the Trial Chamber's legal findings. By strictly bifurcating its factual and legal conclusions, the Trial Chamber was careful to preserve the ability of the Appeals Chamber to reverse its Judgment without necessitating a new trial.

The opinion is significant because it documents the Serb policy and tactics of "ethnic cleansing." In addition, the opinion sets several important legal precedents and produces new standards in international law that will effect future war crimes cases before the United Nations' Yugoslavia and Rwanda Tribunals, domestic courts around the world, and any future international criminal court. Yet there are several controversial aspects of the Judgment that warrant specific mention.

The most important pro-prosecution holding was the Trial Chamber's determination that Tadic had stabbed and cut the throats of two Muslim policemen outside a church after they had been taken into custody by a group of Serb paramilitaries. This is the only killing for which Tadic was found guilty, and was an important factor in his sentencing. The finding is curious for two reasons: First, the only evidence of the murder was the testimony of a single witness, Nihad Seferovic, a Muslim who told the court the unlikely story that he had witnessed the murders when he returned to Kozarac to feed his pet pigeons after the Serb takeover of the town. Second, nowhere in the indictment, which was amended twice by the Prosecutor before trial, is there any reference to this murder. Nevertheless, the Trial Chamber stated that the murder was relevant because the list of acts alleged in the general persecution charge is preceded by the word "including."

Another surprising holding concerned application of the corpus delicti rule to the most sensational charge of the indictment, known as the "castration incident." According to the charge, Tadic and other Serbs tortured and killed four Muslims at the Omarska Hangar Building on June 18, 1992. During the course of this incident, the Serbs forced one prisoner to bite off the testicle of another. The Trial Chamber was convinced that this incident had occurred and found that Tadic was present in the Hangar when it took place, but concluded that "the Prosecution failed to elicit clear and definitive evidence from witnesses about the condition of the four prisoners after they had been assaulted, let alone that they died or that death resulted from the assault upon them." It was not deemed sufficient that the four men never returned to their cells nor were ever again seen by the witnesses. The judges' conservative application of the corpus delicti rule may have been motivated by reports that surfaced during their deliberations that after the Government of Bosnia had convicted a Bosnian Serb of murder and sentenced him to death, two of his alleged victims were discovered alive and well in another part of Bosnia.

By far the most controversial holding in the case concerned the applicability of the grave breaches provision of the fourth Geneva Convention of 1949. A majority of the Trial Chamber, consisting of Judge Ninian Stephen of Australia and Judge Lal Chand Vohrah of Malaysia, found that after May 19, 1992, when the Yugoslav National Army (JNA) "officially" withdrew from Bosnia, the victims of the conflict in Bosnia were not protected persons within the meaning of the Geneva Convention for the Protection of Civilians since they were not in the hands of an occupying power of which they were not nationals. Citing the International Court of Justice's opinion in *Nicaragua v. United States,* the two-judge majority held that Tadic could not be found guilty of committing grave breaches of the Geneva Convention since the prosecution had not proven that Serbia had exercised effective control over the Bosnian-Serb forces after May 19, 1992 (the period when the acts Tadic was accused of had taken place). Just as the International Court of Justice had concluded that the acts of the Contras could not be imputed to the United States because the Contras were not under the control of the United States, Judges Stephen and Vohrah concluded that the acts of the Bosnian Serbs could not be construed as acts of the Federal Republic of Yugoslavia (Serbia and Montenegro) without proof of Belgrade's control of the Bosnian Serbs. Though the majority acknowledged that Belgrade supplied the Bosnian Serbs salaries, weapons and communications, Judges Stephen and Vohrah concluded it was not enough that the Bosnian Serb forces were "dependent, even completely dependent" on Belgrade; proof was needed that Serbia effectively controlled the Bosnian Serb's actions. Moreover, while the majority accepted that the Bosnian Serb troops coordinated their actions with Belgrade, "coordination is not the same as command and control," the two judges ruled.

In a strongly worded dissent, presiding judge Gabrielle Kirk McDonald of the United States asserted that the conflict in Bosnia was international and that the creation of the Bosnian Serb forces "was a legal fiction." Her disagreement involved both the majority's factual determinations and its application of law. She wrote that it was not necessary to prove "effective and daily control" by Belgrade to hold that the Bosnian Serbs were its agent. She stated the Bosnian Serb Army continued to operate as "an integrated and instrumental part of the Serbian war effort." According to Judge Mcdonald, "[t]here remained the same officers, the same commanders, largely the same troops, the same logistics centers, the same infrastructure, the same source of payments, the same goals and mission, the same tactics and the same operations."

In most instances, the indictment assigned three counts to each separate act charged: the first count was charged as a grave breach of the Geneva Conventions as recognized by Article 2 of the Statute of the Tribunal; the second count was charged as an offense against the laws of war as recognized by Article 3 of the Statute of the Tribunal; and the third count was charged as a crime against humanity as recognized by Article 5 of the Statute of the Tribunal. Since the grave breach charges duplicate other counts, the Tribunal's finding that the grave breach provisions of the Geneva Convention are inapplicable has little practical effect on the fate of Dusko Tadic. Yet, from a doctrinal perspective, the grave breach issue is a

matter of great importance to the development of humanitarian law. In addition, the decision may have an effect in those countries, such as Switzerland and Germany, that are presently prosecuting Bosnian war crimes under their domestic laws which implement the Geneva Conventions. Moreover, the ruling may effectively lift the responsibility for atrocities committed during most of the three and a half year-long conflict from Serbian leader Slobodan Milosevic.

This issue will be central to the appeal before the Yugoslavia Tribunal's Appeals Chamber later this year. A strong case can be made that the majority erred in applying the stringent test for state responsibility developed in the *Nicaragua case* to the *Tadic case*. There are several important distinctions between the two cases: the Contras were never United States nationals nor members of the United States army; the United States did not create the contras, though their numbers increased once the United States began to offer assistance; and there was no attempt by the United States to annex Nicaragua to the United States. In contrast, the Bosnian Serb army was created by the Federal Republic of Yugoslavia, was commanded by former members of the Yugoslav National Army (JNA) who continued to receive their paychecks from Belgrade, acted in furtherance of the goal of the Federal Republic of Yugoslavia to annex parts of Bosnia to the Federal Republic of Yugoslavia, and followed the strategy and tactics that were devised by the JNA prior to May 19, 1992. It is particularly noteworthy that the Commentary to Geneva Convention IV states that an Occupying Power cannot avoid responsibility for crimes which it instigated by setting up a puppet authority -- the very thing Milosevic did when the JNA in Bosnia was transformed into the Bosnian Serb army.

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Notes

1. The Prosecutor v. Dusko Tadic, Case No. IT-94-1-T, Opinion and Judgment, May 7, 1997. The full text of the judgment is available at the Yugoslavia Tribunal's Internet Home Page: http//www.org/icty.

2. For a detailed account of the Tadic Trial, see Michael P. Scharf, Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg (1997).

3. The Prosecutor v. Dusko Tadic, Case No. IT-94-1-T, Sentencing Judgment, July 14, 1997.

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**LAW-DEV Internet Forum**

The Asian Development Bank has established the LAW-DEV Internet forum to serve as a vehicle for the interchange of information about legal aspects of economic development in Asia, Africa and Latin America and about the technical assistance activities of the multilateral development banks, bilateral donors, foundations and non-governmental organizations. Launched eighteen months ago, LAW-DEV has nearly 500 subscribers in more than 40 countries worldwide, consisting of developing country government officials, development agency personnel and academics.

To subscribe to LAW-DEV, send an e-mail message to MAJORDOMO@iphil.net and include in the body of the message (not in the subject line) the words: subscribe LAW-DEV. Additional information about LAW-DEV is also available in the Law and Development section of the Asian Development Bank's Home Page at http://www.asiandevbank.org/.

**We Want to Hear from You!**

This newsletter's success depends upon material being submitted by our membership. We encourage submission of any items of interest to members, including articles, letters to the editor, announcements of events, employment opportunities (paid or volunteer) in international law, positions sought, etc. Submission by February 20, 1997 will ensure full consideration for inclusion in the next issue. Submit material for publication at the address listed below. Please contact me before submitting articles. If possible, longer works should be submitted by e-mail or on IBM compatible disk. For anything sent by e-mail, do not assume I have received it unless you receive a confirmation.

We also wish to publish news of our members' activities. Please let us know what you have been doing by completing the following form and sending it to me (or sending me an e-mail message containing the information).

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