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Updates from the International Criminal Courts

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UPDATES FROM THE INTERNATIONAL CRIMINAL COURTS

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

CASES AND PROCEEDINGS

On September 27, 2007, the Trial Chamber handed down its decision in the so-called Vukovar Three case. Mile Mrkšić, Veselin Šljivančanin, and Miroslav Radić were indicted for involvement in the abduction of roughly 260 non-Serbs from the Vukovar Hospital, and the eventual murder and deposit of these individuals into mass graves in Ovčara. Mrkšić, the commander of all Serb forces in the Vukovar area, was sentenced to 20 years imprisonment for war crimes, including aiding and abetting the murder, torture, and cruel treatment of 194 non-Serb prisoners of war. Šljivančanin, head of the security organ of the Guard's Motorised Brigade and Operation Group South, was sentenced to five years imprisonment for the war crime of aiding and abetting torture of prisoners of war. Radić, the company commander of the First Battalion and Guards Motorised Brigade, was acquitted of charges of crimes against humanity and war crimes.

Mrkšić was found guilty because he allowed prisoners to be taken from the hospital to Ovčara and then withdrew the Yugoslav People's Army (JNA) troops guarding these prisoners with the knowledge that the local Territorial Defence and paramilitary forces intended to harm them. Šljivančanin was found guilty because he failed to secure adequate guards in Ovčara or to ensure that the JNA guards acted to prevent the beating of the prisoners.

After finding that the victims were targeted specifically for their known or believed involvement with the Croatian forces, the Trial Chamber dismissed all charges of crimes against humanity. The Chamber also found no evidence that the three men participated in a joint criminal enterprise for committing the offenses against the prisoners in Vukovar. Following the judgment, the mood in Croatia was one of disappointment over perceived leniency in the sentencing. Many Croatians consider

the massacre outside of Vukovar to be one of the most brazen episodes of violence during the war.

Also on September 27, 2007, the Appeals Chamber upheld the Trial Chamber's judgment in *Limaj et al.* This case charged three former members of the Kosovo Liberation Army (KLA) for their purported involvement in crimes against both Serb and Kosovo Albanian civilians in the KLA-run Llapushnik/Lapušnik prison camp between May and July 1998. The charges against Haradin Bala, a prison guard at the camp, were confirmed, and he was sentenced to 13 years imprisonment for torture, cruel treatment and murder. The acquittals of Fatmir Limaj and Isak Musliu were also upheld because the prosecutor was unable to prove that the soldiers were participants in a joint criminal enterprise furthering torture and cruel treatment of prisoners.

On July 20, 2007, in the interests of justice, the Tribunal's Referral Bench revoked a decision referring Sredoje Lukić to Bosnia and Herzegovina for trial. It opted instead to try him jointly with his cousin Milan Lukić at the Tribunal in the Hague. Because the two cases are factually similar, the Referral Bench believed that holding separate trials would be an ineffective use of resources, and would also unnecessarily exacerbate witness trauma. Milan Lukić was the leader of the "White Eagles" or "Avengers," a Bosnian Serb paramilitary group that exacted a reign of violence over the town of Višegrad in southeastern Bosnia. Sredoje Lukić was a member of the group. Both are charged with the brutal murders of over 100 Bosnian Muslim civilians in Višegrad.

The trial of Rasim Delić, former commander of the Army of Bosnia and Herzegovina, began on July 9, 2007. Delić is one of the most senior members of the Bosnian Army to come before the Tribunal. He is being tried under a theory of command responsibility for the murder, cruel treatment, and rapes of captured Croat and Serb soldiers and civilians. Among other crimes, he is charged with failing to take the necessary and reasonable

measures to punish his subordinates who captured and executed Bosnian Croat civilians and soldiers in the villages of Maline and Bikoši. He is also accused of failing to take necessary and reasonable measures to prevent torture, beatings, murder, and decapitation of Bosnian Serb Army soldiers and the rape of three women by his subordinates, the El Mujahed Detachment, in the Kamenica Camp.

On June 12, 2007, Milan Martić was convicted on 16 counts of persecution, murder, torture, deportation, attacks on civilians, wanton destruction of civilian areas, and other crimes against humanity and violations of the laws and customs of war and sentenced to 35 years imprisonment. Martić was Minister of the Interior, Minister of Defence, and President of the self-proclaimed Serbian Autonomous Region of Krajina (within Bosnia and Herzegovina). He was found to have participated, alongside other high-level Tribunal indictees — Radovan Karadžić, Slobodan Milošević, Ratko Mladić and others — in a joint criminal enterprise whose aim was to ethnically cleanse areas of the former Yugoslavia through widespread and systematic crimes.

Convictions of Bosnian Serb Army officers Vidoje Blagojević and Dragan Jokić for their involvement in the Srebrenica massacre were upheld by the Appeals Chamber on May 9, 2007. While affirming Blagojević's conviction for crimes against humanity, the Appeals Chamber reversed charges of complicity in genocide against him and reduced his sentence from 18 to 15 years. The Chamber confirmed judgment against Jokić, Chief Engineer of the Zvornik Brigade of the Bosnian Serb Army, for aiding and abetting exterminations, murder, and persecution by deploying equipment and personnel needed to carry out mass burials in and around Srebrenica.

After being on the run for more than two years, Assistant Commander of Intelligence and Security for the Bosnian Serb Army Zdravko Tolimir was apprehended in eastern Bosnia by Bosnian Serb authorities on May 31, 2007, and later handed over to

European Union forces. His capture was not as fortuitous as it appeared, however. It was widely reported that Serbian authorities actually apprehended Tolimir in a Belgrade apartment and handed him over to Bosnian Serb authorities near the Republika Srpska border in an effort to appease both Serb ultra-nationalists and the European Union, which demands that Serbia increase cooperation with the Tribunal as a condition for membership consideration.

Tolimir is being charged as a part of a joint criminal enterprise aimed at forcing the Muslim population from the Srebrenica and Žepa enclaves and into areas outside the control of the Republika Srpska. His indictment includes charges of genocide, attributing him with responsibility for the murder of more than 7,000 Muslim men and boys killed in Srebrenica in 1995. He is also charged with other crimes arising from the Srebrenica massacre, including killing Bosnian Muslim prisoners in the towns of Potočari and Bratunac in eastern Bosnia and supervising the Bosnian Serb Army as it summarily executed more than 1,700 Muslim men and boys at the Branjevo Military Farm and the Pilica Cultural Center. Tolimir's trial is now underway. He suffers from severe medical problems, however, and has refused to submit to medical treatment while in the Tribunal's custody.

TRIBUNAL COMPLETION STRATEGY

The mandate of the Tribunal's prosecutor, Carla Del Ponte, was extended by Security Council resolution from September 15 to December 31, 2007, to ensure a smooth transition to her successor. Many at the United Nations speculate that her successor will be Belgian Serge Brammertz, who currently leads the UN investigation into the assassination of Lebanese Prime Minister Rafik al-Hariri. For continuity purposes, the preferred successor among senior prosecution staff is Del Ponte's current deputy, American David Tolbert.

Under the terms of the Tribunal's completion strategy, all trials should be completed by 2009 and all appeals by 2010. The Tribunal has begun transferring a small number of cases involving low and intermediate-level accused to competent courts in the former Yugoslavia, allowing the Tribunal to focus on those most responsible for the most serious crimes

committed in the region. By allowing local courts to adjudicate these cases, and the concomitant exposure to issues of humanitarian law, it is hoped that these transfers will strengthen the rule of law in the former Yugoslavia.

On June 11 the Tribunal transferred the case of Milorad Trbić, a former security officer of the Bosnian Serb army, to the War Crimes Chamber of the Court of Bosnia and Herzegovina. The Prosecutor filed a Rule 11 *bis* motion for the referral to a domestic court in Bosnia. After considering the gravity of the crimes and his alleged level of responsibility, the Referral Bench agreed to the transfer. Thus far, ten individuals indicted by the Tribunal have been transferred to Bosnia, one to Serbia, and two to Croatia.

Of the 161 individuals indicted by the Tribunal, only four remain fugitives. These include high-level indictees Ratko Mladić and Radovan Karadžić. Mladić, the military commander of the Bosnian Serb army, and Karadžić, the president of the Bosnian Serb administration, are largely considered the masterminds behind many atrocities that occurred in Bosnia and Croatia. Del Ponte has called their continued evasion of justice a "permanent shadow" on the work of the Court and the international community.

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

PROSECUTOR V. EMMANUEL NDINDABAHIZI, JUDGMENT, ICTR-01-71-A

On January 16, 2007, the International Criminal Tribunal for Rwanda (ICTR) Appeals Chamber issued a judgment upholding the conviction and sentence of Emmanuel Ndindabahizi. Ndindabahizi, the Minister of Finance in the Interim Government of Rwanda, was charged in connection with the Gitwa Hill massacres, which took place between April 17–26, 1994, and resulted in the death of thousands of Tutsis. In addition, Ndindabahizi was alleged to be criminally responsible for his role in the killings that took place at various roadblocks in April and May 1994.

On July 15, 2004, the Trial Chamber convicted Ndindabahizi of the following: incitement to commit and complicity in

genocide for the events at Gitwa Hill; extermination as a crime against humanity at Gitwa Hill; and instigating and aiding and abetting both genocide and murder as a crime against humanity for the killing of an individual known as Mr. Nors at the Gaseke roadblock. On appeal, Ndindabahizi challenged each of his convictions, as well as his sentence of life imprisonment. The Appeals Chamber vacated one count of genocide and one count of crimes against humanity based on a finding that the Trial Chamber erred in holding the Appellant responsible for the death of Mr. Nors, but affirmed the other convictions and held that the reversal on the counts relating to Mr. Nors did not affect the Trial Chamber's sentence, which was affirmed.

Among Ndindabahizi's grounds for appeal was a challenge to the Trial Chamber's finding that the Accused had visited the roadblock at Gaseke, where Mr. Nors was killed. Specifically, the Appellant argued that the Trial Chamber based its finding solely on the uncorroborated testimony of a single witness which was inconsistent with other evidence and incorrect as to dates. The Appeals Chamber agreed, concluding that the lower court's finding that the Appellant contributed to the killing of Mr. Nors was "based only on vague and unverifiable hearsay." While hearsay evidence is not *per se* inadmissible in the ICTR, the Appeals Chamber noted, "[I]t is well established that a Trial Chamber must be cautious in considering such evidence."

The Appeals Chamber further held that the Appellant could not be held liable for instigating and aiding and abetting genocide for the murder of Mr. Nors unless the Prosecutor established a link between the Appellant and the deceased. Instigating, the Appeals Chamber explained, means "prompting another person to commit an offence, thus requiring a subsequent criminal action," while "a conviction for aiding and abetting presupposes that the support of the aider and abetter has a substantial effect upon the perpetrated crime." Hence, the Appeals Chamber concluded that, "[n]o reasonable trier of fact could have concluded beyond reasonable doubt that the killing of Mr. Nors was a result attributable to the Appellant's acts."

Despite the finding that the Appellant could not be held liable for instigating

and aiding and abetting genocide for the murder of Mr. Nors, the Appeals Chamber affirmed the convictions for genocide and extermination as a crime against humanity with respect to Ndingabahizi's involvement with the events at Gitwa Hill. Moreover, the Appeals Chamber found that although the Appellant could not be found responsible for the death of Mr. Nors, the significance of the crimes for which he had been convicted involving the events at Gitwa Hill alone warranted the Trial Chamber's sentence of life imprisonment.

After concluding its review of Ndingabahizi's challenges to the Trial Chamber's judgment, the Appeals Chamber raised, *proprio motu*, a final potential issue with respect to that judgment. Specifically, the Appeals Chamber considered whether the lower court had convicted the Appellant for the crime against humanity of extermination on alternative grounds. The issue arose due to the wording of paragraph 485 of the Trial Judgment, which read, in part:

[T]he Chamber finds that the Accused himself committed the crime of extermination. He participated in creating, and contributed to, the conditions for the mass killing of Tutsi on Gitwa Hill on 26 April 1994, by distributing weapons, transporting attackers, and speaking words of encouragement that would have reasonably appeared to give official approval for an attack. *Alternatively*, the Chamber finds that by these words and deeds, the Accused directly and substantially contributed to the crime of extermination committed by the attackers at Gitwa Hill, and is thereby guilty of both instigating, and of aiding and abetting, that crime." (Emphasis added)

As the Appeals Chamber recognized, the ICTR Rules of Procedure and Evidence permit an accused to "be convicted for a single crime on the basis of several modes of liability." However, the Chamber went on to explain that *alternative convictions* for several modes of liability are generally irreconcilable with the goal of expressing a judgment in an unambiguous scope as to the accused's criminal responsibility. Specifically, because the mode of liability under which individual responsibility is found may either increase or decrease the magnitude of the crime, the criminal liability of the accused must be unam-

biguously established. Upon reviewing the Trial Chamber's holding in paragraph 485 of the judgment, however, the majority of the Appeals Chamber determined that the Trial Chamber did not in fact convict Ndingabahizi in the alternative, but rather intended to fully characterize the Appellant's conduct through cumulatively referring to assorted modes of liability.

Judge Guey wrote a partial dissent on this issue, arguing that the majority did not adequately "assess the characterization by the Trial Chamber of the Appellant's criminal conduct," but rather simply upheld the Trial Judgment's finding without a thoughtful consideration of its accuracy. Moreover, Judge Guey disagreed with the Trial Chamber's finding, upheld by the majority of the Appeals Chamber, that based on the circumstances of this case, Ndingabahizi's conduct constituted the "commission" of the act of extermination. The Trial Chamber found that extermination "may be committed less directly than murder, as by participation in measures intended to bring about the deaths of a large number of individuals, but without actually committing a killing of any person." According to Judge Guey, this finding represented a departure from the appellate jurisprudence of both the ICTR and the ICTY, which defines the *actus reus* of extermination as "the act of killing on a large scale" or the "systematical subjection of a number of people to conditions of living that would inevitably lead to death." Had the Trial Chamber followed precedent, Judge Guey argued, the Appellant could not have been convicted for committing extermination as a crime against humanity, as the Trial Chamber found that the evidence did not establish that the Appellant himself killed any person by his acts at Gitwa Hill.

PROSECUTOR V. ANDRE NTAGERURA, EMMAUEL BAGAMBIKI, AND SAMUEL IMANISHIMWE, ICTR-99-46-T

On July 7, 2006, the International Criminal Tribunal for Rwanda (ICTR) Appeals Chamber rendered its judgment in the case of *Prosecutor v. Andre Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe*. The three Accused had been indicted on charges arising from large-scale attacks against Tutsi refugees in the prefecture of Cyangugu, Rwanda between April and June 1994. On February

24, 2004, Trial Chamber III acquitted the Accused Ntagerura and Bagambiki on all charges. Imanishimwe, who had served as the acting commander of the Cyangugu military camp through July 2004, was also acquitted for the charge of complicity in genocide. However, Imanishimwe was unanimously found guilty of murder as a crime against humanity, imprisonment as a crime against humanity, and torture as a crime against humanity. In addition, a majority of the Trial Chamber, Judge Dolenc dissenting, held that Imanishimwe was guilty under the theory of superior responsibility for the crimes of his subordinates committed at the Gashirabwoba football field, which included genocide, extermination as a crime against humanity, and murder and cruel treatment as serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II. Imanishimwe was sentenced to 27 years' imprisonment. Following delivery of the Trial Chamber's judgment, the Prosecutor and Imanishimwe each filed an appeal.

On appeal, the Prosecution challenged the Trial Chamber's refusal to consider joint criminal enterprise (JCE) as a basis upon which to find each of the Accused liable. The Trial Chamber had held that, if the Prosecutor intended to rely on JCE theory to hold the accused criminally responsible as principal perpetrator of the underlying crimes, rather than as an accomplice, "the indictment should plead this in an unambiguous manner and specify upon which form of [JCE] the Prosecutor will rely." Having found that the Prosecutor failed to do so, the Trial Chamber refused to consider the allegations of criminal responsibility based on a JCE theory of liability.

On appeal, the Prosecutor initially challenged the Trial Chamber's finding that the indictments failed to properly allege JCE as a theory of liability. However, the Prosecutor subsequently acknowledged that the indictments did not plead JCE with sufficient specificity, and instead argued that the indictments had been cured of this defect and thus the Accused were "provided with clear and coherent information of the Prosecution's intention to invoke joint criminal enterprise as a theory of liability." Examining this claim, the Appeals Chamber first rejected the Prosecution's claim that its Pre-Trial Brief contained sufficient factual allegations to put the Accused on notice of an intent to rely on

a JCE theory of liability, given that the Brief made “no specific mention of a joint criminal enterprise, a common criminal plan or any other synonym of that mode of criminal liability.” The Appeals Chamber did agree that the Prosecution alluded to JCE in its Opening Statement at trial, but it concluded that if the material facts of an accused’s alleged criminal activity are not disclosed to the Defense until the trial itself, it will be difficult for the Defense to conduct a meaningful investigation prior to the commencement of the trial. Moreover, according to the Appeals Chamber, the Prosecutor did not, at any time, specify upon which form of JCE it was relying. Accordingly, the Appeals Chamber upheld the Trial Chamber’s finding on JCE liability.

Imanishimwe’s primary ground of appeal was that the Trial Chamber wrongly convicted him of superior responsibility for three crimes — genocide, extermination as a crime against humanity, and murder and cruel treatment as serious violations of the Geneva Conventions — in relation to the events which took place at the football stadium in Gashirabwoba. Specifically, Imanishimwe challenged the fact that the Trial Chamber permitted the Prosecutor to present evidence in support of the Accused’s superior responsibility for the crimes, despite having found that the Prosecutor did not properly plead such a mode of liability prior to trial. According to Imanishimwe, the conviction was invalid because he was unable to prepare a defense against a charge alleging responsibility as a superior for the Gashirabwoba massacre.

The Trial Chamber had admitted the Prosecution’s evidence on Imanishimwe’s superior responsibility for the crimes committed at Gashirabwoba by citing the “Strong Evidence Passage” from the ICTY Appeals Chamber judgment in the case of *Kupreškić et al.* In that judgment, the Appeals Chamber wrote that it “might understandably be reluctant to allow a defect in the form of the indictment to determine finally the outcome of a case in which there is strong evidence pointing towards the guilt of the accused.” The Trial Chamber in the *Ntagerura* case interpreted this language to mean that it could consider evidence from the Prosecutor on events that had not been adequately pled in the indictments. Notably, the Trial Chamber admitted evidence regarding Imanishimwe’s superior responsibility, and ultimately con-

victed the Accused for the criminal acts of his subordinates at Gashirabwoba, despite finding that the relevant paragraphs of the indictment were “unacceptably vague.”

In reviewing Imanishimwe’s appeal, the Appeals Chamber found that the lower court had improperly interpreted the Strong Evidence Passage from the *Kupreškić* judgment. The relevant language, according to the Appeals Chamber, was intended to apply on appeal only, and specifically where an accused had challenged his or her conviction on the grounds that the charge on which the accused was convicted had been insufficiently pled. In that case, the Strong Evidence Passage could be used by the Appeals Chamber in determining whether to remedy a finding of improper pleading by remanding the case to the Trial Chamber, rather than by automatically reversing the conviction. The *Kupreškić* decision could not, on the other hand, be used by a Trial Chamber to admit evidence on a defective charge. Indeed, the Appeals Chamber explained, a conviction may never be pronounced where the accused’s right to a fair trial has been violated because of a failure to provide him with sufficient notice of the legal and factual grounds underpinning the charges against him.

The Appeals Chamber therefore agreed with Imanishimwe that the Trial Chamber improperly convicted him of responsibility as a superior for the crimes committed at the Gashirabwoba stadium. Because the Trial Chamber had found that the evidence failed to establish Imanishimwe ordered the attack at Gashirabwoba or that he was present, the Appeals Chamber set aside the guilty verdict for the relevant counts. As a result, Imanishimwe’s sentence was reduced from 27 to 12 years in prison.

**PROSECUTOR V. VINCENT
RUTAGANIRA, CASE NO.
ICTR-95-1C-T**

The Trial Chamber for the International Criminal Tribunal for Rwanda (ICTR) issued its judgment in the case of *Prosecutor v. Vincent Rutaganira* on March 14, 2005, convicting him of extermination as a crime against humanity. The Accused was sentenced to six years in prison. Originally, Rutaganira was charged with several crimes, including conspiracy to commit genocide, genocide, murder as a crime

against humanity, extermination as a crime against humanity, other inhumane acts as crimes against humanity, serious violations of Geneva Convention Common Article Three, and serious violations of Additional Protocol II. However, Rutaganira agreed to plead guilty by omission to the crime against humanity of extermination and in return the Prosecutor dismissed all other charges.

From May 1985 through the end of July 1994, Rutaganira was *conseiller communal* of the Mubuga *secteur* in Rwanda, responsible for economic, social, and cultural development in the *secteur*. By virtue of his office, Rutaganira served as a link between the inhabitants of his *secteur* and the local political structures.

Rutaganira was accused of having played a leading role in the systematic extermination of Tutsis in the Catholic Church of Mubuga in April 1994. Specifically, the indictment against Rutaganira alleged that approximately one week after thousands of Tutsis had taken refuge in the Mubuga church, on or about April 14, 1994, the Accused gave orders to national and local policemen, as well as the *Interahamwe* (extremist Hutu Militia) and armed civilians, to launch an attack on the church. The indictment also alleged that Rutaganira himself took part personally in the attacks, which went on for several days. The massacres at the Mubuga church resulted in around 5,000 deaths and huge numbers of wounded.

While the Accused initially pled not guilty to all charges against him, he admitted in a plea agreement concluded with the Prosecutor to having known that between April 8–15, 1994, thousands of Tutsi civilians had taken refuge in the Mubuga church. Moreover, Rutaganira admitted knowing that the church was attacked between April 14–17, 1994, by virtue of the fact that he had observed the attackers assembling around the church. Finally, Rutaganira admitted that, despite his position and his having knowledge of the attacks, he failed to act to protect the Tutsi, either before or after the massacres.

The ICTR Statute does not directly address guilty pleas. However, Rule 62(A) of the ICTR Rules of Procedure and Evidence provides that, upon an accused’s first appearance before the court, the Trial Chamber shall call upon the accused to

enter a plea of guilty or not guilty on each count. In the case of a plea of guilty, Rule 62(B) requires that the Trial Chamber confirm that the plea: (i) is made freely and voluntarily; (ii) is an informed plea; (iii) is unequivocal; and (iv) is based on sufficient facts for the crime and accused's participation in it, either on the basis of objective indicia or of lack of any material disagreement between the parties about the facts of the case. Rule 62*bis* provides that the Prosecutor and Defense may agree that, upon the accused entering a plea of guilty, the Prosecutor will do one or more of the following: (i) apply to amend the indictment accordingly; (ii) submit that a specific sentence or sentencing range is appropriate; (iii) not oppose a request by the accused for a particular sentence or sentencing range. The Trial Chamber, however, is not bound by any agreement between the Prosecutor and Defense.

On December 8, 2005, the Trial Chamber found the guilty plea of Rutaganira to have been done freely and voluntarily, and to have been an informed, unequivocal and sincere plea. The Chamber therefore proceeded to examine whether all the elements of the crime against humanity of extermination were present, and whether the form of the Accused's participation in the perpetration of the crime was supported by the facts.

Article 3(b) of the ICTR Statute gives the Trial Chamber the power to prosecute someone for extermination as a crime against humanity when committed as part of a widespread or systematic attack against a civilian population that was targeted on national, political, ethnic, racial, or religious grounds. In addition, the Chamber looked to prior case law and found that, to be guilty of extermination, the Accused must have been involved in killings of civilians on a large scale. The Chamber found that the massacres committed at the Mubuga church had been perpetrated on a large scale and had caused thousands of casualties. The Chamber also found that the massacres had been perpetrated as part of a widespread and systematic attack. Finally, the Chamber found that the thousands of people mentioned were victims because they were members of the Tutsi ethnic group. Therefore, the Chamber found that the massacres committed at the Mubuga church amounted to extermination

as a crime against humanity under Article 3(b) of the Statute.

Having determined that the Mubuga church massacres satisfied the requirements of the crime against humanity of extermination, the Trial Chamber next turned to the issue of whether one can be convicted of aiding and abetting the commission of the crime through omission, which is the sole mode of responsibility to which Rutaganira pled guilty. Complicity is not expressly included among the forms of liability enumerated in Article 6(1) of the ICTR Statute, which provides that a person shall be individually responsible for a crime if he "planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of the crime." However, both *ad hoc* tribunals have held that aiding and abetting is a form of complicity, which consists of "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime." Furthermore, the *ad hoc* tribunals have held that aiding and abetting as provided for in Article 6(1) may be carried out by omission, rather than exclusively by commission. Accordingly, the Chamber held that participation by omission in extermination as a crime against humanity is covered by the aiding and abetting provision of Article 6(1) of the Statute.

Finally, the Trial Chamber considered whether Rutaganira himself was guilty of the crime against humanity of extermination by omission, considering the elements of aiding and abetting by omission. In determining the *actus reus*, the Chamber discussed whether the Accused had the authority to prevent the crime, and whether he had a legal duty to act which he failed to fulfill. The Chamber determined that, by virtue of his role as *conseiller communal*, Rutaganira had some power to protect the Tutsis who sought refuge at Mubuga church. Indeed, several witnesses who testified for the Defense to offer mitigating circumstances for purposes of sentencing revealed that, prior to the events of April 1994, Rutaganira had readily opposed any decisions by the *bourgmestre*, or mayor, which struck him as unfair or inappropriate for the people in his *secteur*. Therefore, the Chamber found that Rutaganira "had the power to convene a meeting of the inhabitants of his *secteur* and conduct discussions about the tragic events in order to prevent

participation in the massacres that occurred at the church, at least by civilians." The Chamber further found that Rutaganira had a legal duty to use his authority to lessen the harm of the crime, as international law places a duty on every public authority to act in order to protect human life. Because Rutaganira failed to use his authority to prevent the violation of basic human rights, the Chamber held that the facts admitted by the Accused proved that the *actus reus* requirements of aiding and abetting by omission were satisfied.

To determine whether there was sufficient *mens rea*, the Chamber considered whether Rutaganira had knowledge of the principal perpetrator committing extermination as part of a widespread and systematic attack, and whether he knew that his conduct would further the perpetration of that crime. The Chamber found that by virtue of his position as *conseiller communal* for Muguba *secteur*, "the Accused must have known about the serious events that were occurring in his *secteur* and the crimes that were being perpetrated there on a large scale." As a result, the Chamber found that Rutaganira knew that his omissions were part of a widespread and systematic attack targeted at a civilian population on ethnic grounds. Furthermore, Rutaganira was not only aware of his duties as *conseiller communal* but also "of his moral authority *vis a vis* the civilian population in his *secteur*." He admitted that although he was *conseiller* he did not act to protect the Tutsis taking refuge in the church thus satisfying the *mens rea* requirement of the crime. Therefore, the Chamber found that there was sufficient evidence to prove that Rutaganira was guilty of extermination as a crime against humanity because he aided and abetted that crime by omission.

SPECIAL COURT FOR SIERRA LEONE PROSECUTOR V. BRIMA, KAMARA & KANU, CASE No. SCSL-04-16-T

On June 20, 2007, the Trial Chamber of the Special Court of Sierra Leone (SCSL) delivered its judgment in the case of *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, marking the first judgment issued by the Special Court.

The three Accused were senior members of the Armed Forces Revolutionary Council (AFRC), a faction rebel group

that broke away from the Sierra Leone Army and forcibly overthrew the democratically elected government of President Ahmed Tejan Kabbah in May 1997. Each was convicted of either committing or bearing superior responsibility for: the war crimes of acts of terrorism, collective punishments, outrages upon personal dignity, pillage, violence to life, health and physical or mental well-being of persons, in particular murder, and violence to life, health and physical or mental well-being of persons, as mutilation; the crimes against humanity of rape, extermination, murder, and enslavement; and the recruitment and use of child soldiers as a serious violation of international humanitarian law. The sentences are as follows: 50 years' imprisonment for Brima, 45 years for Kamara, and 50 years for Kanu.

Among the theories of criminal liability forwarded by the Prosecution was an allegation that the three Accused had participated in a joint criminal enterprise that involved "gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control." The crimes alleged in the indictment, according to the Prosecutor, "were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the [JCE]." The Defense challenged these allegations on the ground that the Prosecution failed to properly plead JCE liability, arguing that the common purpose to "take any actions to gain and exercise political power and control over the territory of Sierra Leone," as such, did not amount to a specific crime and thus was too broad to prove the existence of a JCE.

The Trial Chamber began its analysis by explaining the three forms of JCE: basic, systemic, and extended. Each of the three forms requires: (1) a plurality of individuals; (2) the existence of a common plan to commit a crime within the jurisdiction of the court; and (3) some level of contribution by the accused to the common plan. The differences among the three "forms" of JCE are found in the requisite *mens rea*. In the "basic" form, all co-perpetrators must share the "same criminal intention." The "systemic" form is characterized by the existence of an organized system of ill-treatment, such as a concentration camp, of which the accused must have personal knowledge as well as an intent to further

the system of ill-treatment. Finally, under the "extended" form of JCE, an accused may be held responsible for crimes falling outside the scope of a common plan if the crimes were foreseeable and the accused willingly assumed the risk that such crimes would be committed by a member of the group.

Turning to the specifics of the Defense's challenge, the Trial Chamber agreed that the Prosecution had not properly pled liability for JCE against the former members of the AFRC. First, the Trial Chamber found that, by alleging the "basic" and the "extended" forms of JCE disjunctively, the Prosecutor impeded the Defense's ability to know the material facts of the JCE against them. The Trial Chamber then explained that the Prosecution did not sufficiently plead either the "basic" form of JCE or the "extended" form. Considering the latter form first, the Trial Chamber held that while "serious violations of international humanitarian law by certain members of armed forces during conflict are a foreseeable consequence of such engagement in conflict," this does not "necessarily make the act of engagement in armed conflict in itself an international crime." Thus, the Trial Chamber rejected what it described as the Prosecutor's attempt to charge the foreseeability of international crimes in a common purpose that is "not inherently criminal." Similarly, the Chamber held that the Prosecution had not properly pleaded the "basic" form of JCE because the common plan described in the indictment — namely, to gain and exercise political power and control over the territory of Sierra Leone — did not involve international crimes at the inception of the JCE. Finally, although the Trial Chamber recognized that a common purpose might change over time such that "a new JCE may emerge from a common purpose fundamentally different in nature and in scope from the initial common purpose," the Chamber found that the Prosecution failed to "provide material facts of this new or changed common purpose in the [i]ndictment."

In its indictment, the Prosecution charged each of the Accused on four different counts of sexual violence: rape, sexual slavery, and other inhumane acts in the form of "forced marriage" as crimes against humanity, as well as outrages upon personal dignity as a war crime. Based on the evidence presented, the Trial Chamber

convicted each Accused on one count of rape as a crime against humanity and one count of outrages upon personal dignity as a war crime, which the Chamber held "encompasses rape and/or other types of sexual violence as well as enslavement." However, the Trial Chamber dismissed the charges of sexual slavery and other inhumane acts (forced marriage) as crimes against humanity on the ground that these charges were duplicative of the charges for the crime against humanity of rape and the war crime of outrages upon personal dignity.

Justice Doherty dissented on the majority's dismissal of the charges relating to sexual slavery and other inhumane acts (forced marriage) as crimes against humanity. As to the first, Justice Doherty objected to the majority's finding on the ground that the Defense had not challenged the duplicative nature of the charge until after the trial had concluded. With respect to the second dismissed charge, Justice Doherty wrote that the majority failed "to determine whether 'forced marriage' is of sufficient gravity to meet the requirements of an 'other inhumane act'" constituting a crime against humanity under the SCSL Statute. She stressed that the conduct contemplated as "forced marriage" does not "necessarily involve elements of physical violence such as abduction, enslavement or rape," and thus was not duplicative of the charges for the crime against humanity of rape or the war crime of outrages upon personal dignity. Furthermore, Justice Doherty argued that, by "vitiating the will of one party and forcing him or her to enter into a remain in a marital union, the victim is subject to physical and mental suffering" sufficiently grave to constitute the crime against humanity of other inhumane acts.

The Trial Chamber judgment against the AFRC constitutes the first time an internationalized tribunal has found individual criminal responsibility for the act of recruiting and using child soldiers in armed conflict. The issue was first addressed by the SCSL Appeals Chamber in March 2004 in response to a defense motion arguing that the recruitment and use of child soldiers was not a war crime in the context of a non-international armed conflict at the time the accused allegedly engaged in the practice in Sierra Leone. The Appeals Chamber rejected the claim, holding that the crime had been recognized under cus-

tary international law by November 1996, the beginning of the SCSL's temporal jurisdiction.

In the case against the AFRC, the Trial Chamber found that the three accused routinely conscripted, enlisted, or used children under the age of 15 for military purposes. Thousands of these children were abducted throughout Sierra Leone, placed in AFRC training camps, and ultimately used in combat. Notably, the Trial Chamber found that the "use" of child soldiers to "participate actively in the hostilities" is not limited to "participation in combat." Rather, any labor or support "that gives effect to, or helps maintain, operations in a conflict constitutes active participation, including the use of children to conduct logistical support, carry supplies, acquire food, procure equipment, carry messages, create trails, or act as decoys or human shields." This finding is notable in light of the ongoing debates within the International Committee for the Red Cross and broader International Humanitarian Law community regarding the range of activities that may constitute "participation" in armed conflict.

INTERNATIONAL CRIMINAL COURT

THE SITUATION IN UGANDA AND THE CASES AGAINST COMMANDERS OF THE LORD'S RESISTANCE ARMY

On August 10, 2007, the International Criminal Court's (ICC) Pre-Trial Chamber (PTC) II issued the *Decision on Victims' Application for Participation*, granting six applicants victim status in the Case against the Lord's Resistance Army (LRA) commanders and two applicants victim status in the Uganda Situation. Forty-two applications were deferred until the Victims Participation and Reparations Section reports additional information. The Court will also appoint a common legal representative.

The Office of the Prosecutor (OTP) and Office for Public Counsel for the Defense (OCPD) continue to argue that the criteria for gaining victim status be applied restrictively. The prosecution emphasized that allowing participation of any person who claims to have suffered as a result of a crime within the Court's jurisdiction would have three consequences of concern. First, broad inclusion would negatively impact the activities and limited resources of the Court. Second, the resources of the

Victims and Witnesses Unit would be depleted by extending its protective efforts to an increased number of victims. Finally, broad inclusion could threaten the integrity of the trial and diminish perceptions that investigations are objective, particularly by labeling people "victims" at the pre-trial stage before actual crimes are established.

In determining the applicants' status as victims, PTC II took a fact-based approach based on previous PTC I jurisprudence in the DRC Situation. Under Article 68(3) of the Rome Statute, the principle criterion is that the "personal interests" of applicant victims must be affected. Rule 85(a) of the Rules provides that, "'victim' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court." The assessment of an applicant's claim must analyze i) whether the identity of the applicant as a natural person appears duly established; ii) whether the events described constitute a crime within the Court's jurisdiction; iii) whether the applicant claims to have suffered harm; and iv) most crucially, whether such harm appears to have arisen as a result of the event constituting a crime within the jurisdiction of the Court.

In a Situation, the applicant's statements must show to a high degree of probability temporally and territorially that the alleged incidents occurred. The determination must also consider the impact on the applicant's personal interests.

Peace talks in June concluded with a draft protocol on accountability and reconciliation that would establish national, hybrid war crimes tribunals that try suspected war criminals under traditional tribal justice systems. According to interior minister Ruhakana Rugunda, the protocol envisages "a unique legal system designed to achieve lasting peace and accountability." There is some doubt, however, whether a national alternative to the ICC would provide sufficiently vigorous investigations and prosecutions.

Achieving justice requires credible and independent prosecutions that meet international fair trial standards and are accompanied by sentences that reflect the gravity of the crimes. Under the principle of complementarity, if national prosecutions are legitimate, the ICC does not have jurisdiction. According to Human Rights

Watch, however, sham national proceedings aimed at shielding the accused, or legitimate prosecutions accompanied by "slap-on-the-wrist" sentences will not suffice to convince ICC judges that ICC prosecution would be duplicative. Regardless, the government of Uganda remains obligated to arrest and surrender LRA leaders to the ICC.

Ensuring justice is achieved — as opposed to focusing solely on reconciliation and forgiveness — is important because trials provide accountability, promote stability, and deter future atrocities. Framing the issue as a peace-versus-justice debate can present a false sense of conflict that obstructs the achievement of both. Impunity does not lead to lasting peace; those interested in seeing the conflict end should insist on an outcome that includes both peace and justice. An International Center for Transitional Justice (ICTJ) report concluded that the majority of respondents (citizens in eight counties most affected by the conflict) do not want the ICC to jeopardize the peace process but do want some form of accountability for past crimes.

This perceived conflict between peace and justice is belied by facts on the ground. Many groups have recognized that the ICC warrants played an important role in bringing LRA leaders to the negotiating table. Similarly, despite ongoing peace talks, on September 8, 2007, Ugandan President Yoweri Museveni and DRC President Joseph Kabila signed an agreement to send joint military forces to dislodge LRA fighters from their stronghold in Garamba National Park, a jungle in northeast DRC. While this was a reaction to LRA failures to comply with peace-treaty benchmarks, the LRA has threatened retaliation and criticized the government for instigating additional violence. While this agreement may be mere government posturing, it indicates that ICC warrants are less an obstruction to peace-building than the inability of parties to set and achieve peace-building goals. Characterizing the ICC warrants as obstructions to peace therefore appears to be more of a ploy by leaders trying to escape criminal liability than a serious obstruction to cooperation.

THE SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO AND THE CASES AGAINST THOMAS LUBANGA DYILO AND GERMAIN KATANGA

General Germain Katanga was transferred to The Hague in the early morning hours of October 18, 2007, becoming the second suspect admitted to ICC custody. Katanga is charged on the basis of individual criminal responsibility for war crimes and crimes against humanity, including killings, pillaging, child recruitment, and sexual enslavement. Katanga was chief of staff of the Patriotic Force of Resistance in Ituri (FRPI), the military wing of the Front for National Integration (FNI) militia. Ethnically Lendu, the militia fought against the Union of Congolese Patriots (UPC), an ethnically Hema group formerly led by Thomas Lubanga, the first suspect transferred to the ICC. Although Congolese authorities arrested Katanga in 2005, he was never tried, and his continued detention violated international fair trial norms.

Katanga's transfer helped the Court salvage credibility lost within the DRC due to the slow proceedings and the limited scope of charges brought against Lubanga. Sources in Ituri, however, said that the transfer was announced in Bunia (the capital of Ituri province) on the government's deadline for disarming Ituri militia, and served, at least partially, to foil the disarmament process. UPC officials said the ICC prosecution should not limit its attention to the Hema-Lendu conflict, but should broaden investigations to include other ethnicities, as well as state officials in Kinshasa and Kampala who funded and supported the local warlords.

In February, Defense Counsel Jean Flamme filed a confidential request to be removed from the case, claiming the Court provided fewer resources to the Defense than to the Prosecution. Lubanga selected Catherine Mabilille as Flamme's replacement. The Court officially confirmed Mabilille's appointment on June 22, leaving a period in which Lubanga was unrepresented and proceedings were stayed. In May, Pre-Trial Chamber I (PTC I) rejected Lubanga's request for additional resources. The Paris Bar requested leave to intervene as *amicus curiae* to present a memo on the economic, material and

human resources reasonably necessary for an effective defense.

The Executive Committee of the International Criminal Bar (ICB) made a similar filing in June, requesting leave to file an *amicus curiae* brief supporting Lubanga's May 25 *pro se* request for review of the Registrar's decision denying him supplemental legal aid. On June 14, the Registrar granted the defense limited additional resources including one additional legal assistant. Moreover, the Registrar ordered co-counsel to immediately join the defense team, allowed former counsel to participate as a consultant for three months, and provided an investigation budget of \$5,315.

While ICC officials study feasibility issues, military courts in the DRC may offer hope for more immediate justice on the ground. In February, a military court in Bunia handed down death sentences to 13 soldiers for massacring civilians in Ituri; in April 2006, a court found seven officers guilty of mass rape. Significantly, this marks the first time rape has been tried as a crime against humanity in the DRC. The military courts are highly controversial, however, and many critics cite problems such as trumped-up charges, civilian trials, rampant political interference, and failure to conform to international fair trial standards. To improve the system, a military criminal law advisor with the United Nations Mission in Democratic Republic of Congo (MONUC) is identifying and presenting resource needs to international donors. Basic resource challenges are dire, but MONUC officials say given proper support and guidance, the military justice sector is one of the greatest hopes for dealing with impunity in the country.

THE SITUATION IN DARFUR AND THE CASES AGAINST AHMAD HAROUN AND ALI KOSHEIB

One of the greatest challenges facing the ICC is obtaining cooperation to promote peace and justice in Sudan, where the international community has done little to address grave, widely documented human rights violations that continue to plague Darfur. As a result, the Sudanese government has flaunted its disregard for the international community, the laws of humanity and the requirements of the public conscience.

During Secretary General Ban Ki-moon's visit to Sudan in September, the Minister of Humanitarian Affairs Ahmad Haroun — who the ICC has charged with 42 counts of war crimes and crimes against humanity, including murder, rape and persecution related to Darfur — was appointed to co-chair the committee that handles human rights complaints from Darfur. The other ICC accused, Janjaweed leader Ali Kosheib, had been held in state prison on charges being brought in national proceedings. Although U.N. Security Council Resolution 1594 requires the Sudanese government to comply with ICC arrest warrants, the Government of Sudan released Kosheib from prison on lack of evidence. The ICC charged Kosheib with 51 counts of war crimes and crimes against humanity, including rape, torture, and murder. The government stated multiple times that it will not comply with ICC investigations on Darfur.

The Sudanese government created a Special Criminal Court on the Events in Darfur in June 2005. The court would serve as "a substitute to the International Criminal Court," according to Sudan's Chief Justice. In its first year, the Court only heard thirteen cases involving low-ranking individuals primarily accused of minor offenses which did not reflect the gravity or scale of atrocities in Darfur. In its second year, the Court reviewed no new cases. Derived from a mix of Sharia law, Sudanese statutes and international law, the Court's statute provides no definition of crimes against humanity, nor does it contain a prohibition on evidence obtained through torture. The statute contains broad immunity clauses and requires a severely high threshold of proof in the prosecution of rape, including testimony from four male witnesses. This presents a serious obstacle to promoting justice and accountability in a conflict where combatants have widely employed rape as a tactic aimed at the psychological and emotional subjugation of a civilian population.

In proceedings for the Situation in Sudan, PTC I entertained hearings relating to the standard for victim participation similar to those taking place in the Uganda Situation.

HYBRID AND INTERNATIONALIZED TRIBUNALS

THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

The Extraordinary Chambers in the Courts of Cambodia (ECCC), the hybrid Cambodian-United Nations tribunal established to try senior leaders of the Khmer Rouge has made positive strides over the past several months. Corruption allegations and low standards for hiring Cambodian staff, however, have raised concerns regarding the court's transparency.

The ECCC seeks justice for victims of a genocidal regime accused of killing 1.7 million Cambodians. Pursuant to a 2001 Cambodian statute establishing the court, the ECCC has jurisdiction over senior Khmer Rouge officials responsible for serious violations of Cambodian and international law perpetrated between April 17, 1975, and January 6, 1979. To date, no senior Khmer Rouge officials have faced prosecution before a properly constituted court for international crimes committed during this period. A June 2003 agreement between Cambodia and the UN specifies the degree of international involvement with the court. The ECCC is a hybrid court with Cambodian and international judges, prosecutors, and defense attorneys.

On 13 June 2007, a panel of judges agreed on the Internal Rules governing ECCC's procedure after stalling for over six months due to disagreements. Judges claim that the Internal Rules lead to "fair, transparent trials before an independent and impartial court." The Internal Rules deal with a wide spectrum of issues and allow victims to join lawsuits as civil parties to obtain collective and non-financial reparations, but not individual financial compensation. Prosecutors must prove a defendant's guilt beyond a reasonable doubt to convict an accused. Moreover, the Internal Rules guarantee defendants will have one Cambodian and one foreign attorney.

Certain key Khmer Rouge officials will never stand trial, including Pol Pot, the regime's notorious leader who died in 1998 and Ta Mok, the ruthless military commander who died in July 2006. Nevertheless, on July 18, 2007, ECCC prosecutors announced they submitted a list of five individuals to the tribunal to be

considered for prosecution. Since then, the tribunal has taken custody of two key figures, including Kaing Guek Eav, known as "Duch" and Nuon Chea, "Brother Number Two." Duch commanded the notorious S-21 prison at Tuol Sleng, where regime officials tortured and killed thousands of Cambodians. He had been detained since 1999 for charges the Cambodian government brought against him but was transferred to ECCC's custody in late July. Duch, aged 65, is the youngest living leader of the regime. Nuon Chea, known as "Brother Number Two" due to his service as Pol Pot's second in command was arrested on September 19 and charged with crimes against humanity and war crimes.

Despite progress, court observers have criticized the ECCC for corruption. Allegations that Cambodian employees paid court officials to obtain and maintain employment emerged last year. In response, the United Nations Development Programme (UNDP) contracted an independent third party to audit the court's hiring practices. The audit, which did not investigate monetary kickback allegations, ran between January 29 to February 8, and March 27–30, 2007.

Chapman University School of Law professor John Hall wrote in a September 21 article for the *Wall Street Journal Online* that the audit's findings illustrate severe problems with the tribunal's hiring practices. The audit claimed that the hiring process was in such a poor state that, "recruits did not meet the minimum requirements specified in the vacancy announcements in terms of academic qualifications or professional working experience." The audit recommended that Cambodian staff be dismissed, and a new recruitment process begin under UNDP supervision. The audit suggested that the UNDP should consider withdrawing from the project altogether if Cambodian administrators failed to make fundamental changes to hiring practices.

In response to the audit, the Project Board, which oversees the "Special Support of the Cambodian Side of the Budget for the ECCC," took measures to improve the tribunal's human resources management. In its September meeting, the board agreed upon measures to improve recruitment procedures of the Cambodian staff and to promote transparency. It remains to be seen if such measures will be implemented

and will make a substantive difference in problematic hiring practices.

THE WAR CRIMES CHAMBER OF THE STATE COURT OF BOSNIA AND HERZEGOVINA

With the International Criminal Tribunal for the former Yugoslavia (ICTY) nearing the end of its mandate, the War Crimes Chamber (WCC) of the State Court of Bosnia and Herzegovina continues to grow in importance. When the conflict ceased, the country's legal institutions were impaired and incapable of impartially trying those accused of atrocities during the war. It became apparent that the ICTY could only try a select number of suspects and needed help from domestic jurisdictions within the former Yugoslavia. In February 2002, the Office of the High Representative, responsible for implementing civilian aspects of the Dayton Accords, and the ICTY agreed to transfer lower and mid-level suspects to domestic jurisdictions. The WCC emerged through these circumstances in early 2005.

The WCC is one of three chambers within the State Court of Bosnia-Herzegovina's Criminal Division. Sitting in Sarajevo, the WCC's jurisdiction is limited to trying accused war criminals who perpetrated crimes in Bosnia. The WCC may hear both cases of ICTY transfers and sensitive cases initiated within local or national courts. Three-judge panels consisting of two international judges and a local judge preside over trial and appellate chambers. The court's international components incorporate standards accepted in the international community. International judges are a temporary characteristic of the court, however, and the court will phase out these judges by 2010. Fully integrated into the Bosnian legal system, the WCC will continue to function indefinitely as its jurisdiction is not limited to a specific time period.

Since its inception, the WCC has convicted twelve accused war criminals. The most common charges the court has brought against the accused are war crimes against civilians and crimes against humanity. According to the State Court's web site, the court convicted one person at the trial level in 2005. In 2006, however, the WCC convicted eight individuals. Among the convicted was Radovan Stanković, the first

war criminal transferred from the ICTY to the WCC. The appellate chamber confirmed a lower court conviction, and convicted two individuals the appellate division had earlier remanded for new trials.

To date, the WCC continues to function successfully. Recent convictions at the trial level include three accused war criminals: Krešo Lučić, a former commander of the Croatian Defence Council military police convicted of crimes against humanity; Nenad Tanasković, a Bosnian Serb former reserve police officer convicted of crimes against humanity; and Niset Ramić, a Bosnian Muslim convicted of war crimes committed against Serbs. In a rare moment, the WCC acquitted Momčilo Mandić, a Bosnian Serb and ex-interior minister, serving later as justice minister, who was accused of war crimes and crimes against humanity.

Along with its successes, the court has dealt with problematic issues. Despite the fact that distinct criminal codes operate in different courts throughout Bosnia, the WCC has had to apply the new set of laws that Parliament passed in 2005. These include a new criminal code and a new

criminal procedure code. The laws are based on both Bosnian law and modern European law, incorporate elements of common law, and include changes to the investigative, trial and appellate stages. In September 2007, a group of defendants in the WCC's custody began a hunger strike to protest the criminal code the court applies. The accused want the court to apply the former Socialist Federal Republic of Yugoslavia's (SFRY) Criminal Code, which envisages less severe punishments than the new code and does not include crimes against humanity. The discrepancies in the different criminal codes pose problems that the Court must effectively resolve. **HRB**

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INTERNATIONAL LEGAL UPDATES *(Continued from page 39)*

and arrested numerous Tibetans celebrating the award.

The five 14- and 15-year-old boys who remain in custody were originally held in the local police station, where visiting family members found Tseten bleeding from the head. Government officials did not allow family members to take Tseten for medical care.

On September 10, non-uniformed security officers moved the students to the town of Xiahe, two hours away. Xiahe officials deny family visitation, and refuse to reveal the location of the students. Tseten is currently being treated in a hospital in Xiahe for severe head injuries. It is unclear if he will be detained again after his treatment. Two 14-year-old boys, who were moved to Xiahe, were released on September 24 under the conditions that each of their families pay fines of 4,000 yuan (\$532 U.S.) and that the boys be confined to their

villages. Of the five students who remain in custody, some were reportedly beaten with electric prods.

Organizations such as Human Rights Watch have called for the release of these students and protection from further persecution. Chinese government officials will not confirm that the students remain in custody. **HRB**

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