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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

The trial of influential Serbian nationalist and politician Vojislav Šešelj restarted on December 7, 2007. Šešelj has been awaiting trial at The Hague for five years after voluntarily surrendering to the Tribunal. His trial was halted last year in response to a 28-day hunger strike he conducted in protest over various evidentiary matters, including his wish to have the book he authored translated into English so as to be submitted into evidence. Šešelj is the leader of the nationalist Serbian Radical Party (SDS), which holds one third of the seats in Serbia's Parliament. He also formed and led a notoriously violent militia group associated with the SDS, popularly known as the Chetniks or Šešelj's Men. He has been indicted for inciting crimes against humanity and war crimes. Prosecutors claim that by using inflammatory rhetoric and propaganda, he rallied his several-thousand-men-strong militia into committing atrocities against civilians in Croatia and Bosnia. Observers expect Šešelj's behavior at trial to be similar to predecessor defendant Slobodan Milošević, who frequently shouted obscenities and created chaos in the courtroom. The first day of Šešelj's trial proved as dramatic as expected with the accused defending nationalist views and taking credit for the idea and movement behind the creation of a "Greater Serbia."

One of the men responsible for the lengthy and brutal siege of Sarajevo, Dragomir Milošević, was found guilty on December 12, 2007 for committing crimes against humanity and violations of the laws or customs of war. He was sentenced to 33 years' imprisonment. A Bosnian Serb, General Milošević commanded the Bosnian Serb Army's Sarajevo Romanija Corps in August 1994. He oversaw the terror campaign against the besieged city for 15 months. Under his order the city was shelled relentlessly and its residents subject to sniper fire. One of the more horrific

mortar attacks that briefly captured the world's attention was the shelling of the Markele Market by the Romanija Corps in August of 1995. Many Bosnian Serbs have maintained that the Bosnian Army shelled its own people to stir up international sympathy; however, the Tribunal struck down this theory previously. The bench was particularly disturbed by the use, under Milošević's command, of modified air bombs to attack densely-packed Sarajevo because these bombs are "highly inaccurate weapon[s]" with "extremely high explosive force." One expert witness stated that the bombs could deviate from their intended target by up to a kilometer.

The Appeals Chamber rejected the appeal of Dragan Zelenović on October 31, 2007 and affirmed his 15-year sentence for the torture and rape of Bosnian Muslim women and girls from Foča in eastern Bosnia. Zelenović, a Bosnian Serb soldier and de facto military policeman, assisted in the capture of about 70 Muslim civilians — women, children, and elderly — from Foča after the Bosnian Serb Army overtook the municipality in June of 1992. The group was held for several months in deteriorating circumstances, subject to starvation and assault. Zelenović raped several women, repeatedly, throughout the duration of their captivity. He was indicted with several other members of the Bosnian Serb military police and paramilitary groups in April of 1992 after being on the run from the Tribunal for several years. He pled guilty to torture and rape as a crime against humanity.

Rape has long been considered a crime that could amount to a crime against humanity. The ICTY has recognized that sexual violence may be a tool used against civilians during war. The International Criminal Tribunal for Rwanda has also recognized this, finding rape as an act of genocide in the first case before that Tribunal. Before the recent ICTY conviction of the men involved in widespread rape of women in Foča, however, international tribunals did not prosecute rape as a crime against humanity.

To constitute a crime against humanity, the crime of rape must be committed as a part of a widespread or systematic attack against a civilian population. This element is what distinguishes crimes against humanity from ordinary crimes. The targeting of a collective group, in the form of a civilian population, rather than the individual victim, places crimes against humanity among the gravest of crimes. Of the five other individuals indicted with Zelenović, the Tribunal convicted three — Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković — for raping, torturing, and enslaving a number of Bosnian Muslim women and girls. The prosecution of the rapes committed against the women of Foča led to the first convictions by the ICTY for not only rape but also for enslavement as crimes against humanity.

The remaining two defendants on the Foča indictment, Gojko Janković and Radovan Stanković, were transferred to Bosnia and Herzegovina to stand trial before Sarajevo's War Crimes Chamber. Janković was found guilty of torture and rape and sentenced to 34 years' imprisonment. Stanković was convicted of enslavement and rape and sentenced to 20 years' imprisonment. Stanković escaped custody in May 2007 and has yet to be apprehended.

The acquittal of Sefer Halilović, the former Deputy Commander and Chief of Main Staff of the Army of the Republic of Bosnia and Herzegovina, was affirmed by the Appeals Chamber on October 16, 2007. The Prosecution appealed the Trial Chamber's 2005 judgment that Halilović was not responsible under a theory of command responsibility for atrocities committed by Bosnian troops in the villages of Grabovica and Uzdol in Herzegovina in September 1993. The Appeals Chamber affirmed the acquittal stating that the Prosecution had failed to establish that Halilović exercised the required degree of effective control over the troops to establish superior responsibility.

## CONTEMPT OF COURT CHARGES

Two more witnesses scheduled to testify for the Prosecution in the Haradinaj et al. case were indicted for contempt of court in November 2007. The two witnesses, Avni Krasniqi and Sadri Selca, were supposed to testify for the Prosecution and were subpoenaed, but despite assurances of witness protection, the two witnesses refused. The Prosecution felt that the witnesses had been intimidated, believing there have been problems with witness intimidation throughout the trial. Haradinaj, a popular, well-known former Prime Minister and member of the Kosovo Liberation Army (KLA), is charged with participation in a joint criminal enterprise aimed at obtaining full control over a partially KLA-controlled region through forcible removal and mistreatment of Serbians and Kosovar Albanians believed not to support KLA goals. The difficulty the Prosecution has faced in convincing witnesses to testify has led it to seek witness subpoenas and other measures for witness protection.

## A FAREWELL TO FORMER PROSECUTOR DEL PONTE

On January 1, 2008, the appointment of the ICTY's new Prosecutor Serge Brammertz came into effect. Brammertz is the fifth Prosecutor to take office at the Tribunal, following Ramon Escobar Salom, Richard Goldstone, Louise Arbor, and Carla Del Ponte. Brammertz comes to the ICTY from his position as Commissioner of the International Independent Investigation Commission into the assassination of former Lebanese Prime Minister Rafik al-Hariri.

Carla Del Ponte leaves her eight-year tenure at the Tribunal for a position as Swiss Ambassador to Argentina. In Del Ponte's final address to the Security Council regarding the progress of the Tribunal, she warned of meddling from Serbia. She accused the Serbian government of blocking the arrest of the two most wanted leaders of the political and military branches of the former Bosnian Serb Government, Radovan Karadžić and Ratko Mladić, respectively. Del Ponte claimed that Serbian officials refused to conduct "even the most basic investigatory procedures" and that the two men had

been "repeatedly sighted" in Serbia. She said that despite rhetorical commitment to capture and hand over the four remaining fugitives, Serbia has "no clear roadmap, no clear plan in the search for fugitives, no serious leads, and no sign that serious efforts have been taken to arrest the fugitives." Del Ponte recognized that Serbia has made efforts to cooperate with the Tribunal, such as establishing a National Security Council to serve as a link between the Tribunal and the government, but that these steps are "slow and inefficient." She alleges that Serbia negotiated with Ratko Mladić regarding his transfer to The Hague as recently as 2006, but that Serbia refused to arrest and transfer him involuntarily.

Del Ponte repeated her oft-stated warning to the European Union (EU) not to consider Serbia as a candidate for accession until Karadžić and Mladić are apprehended. Unfortunately, the European Union appears to be moving forward with the process regardless of whether Serbia complies with the Tribunal's demands. After pro-western Boris Tadić's reelection as President of Serbia in February 2008, the EU Enlargement Commissioner hinted that he was ready to sign a Stabilisation and Association Agreement (SAA) with Serbia, a precursor to accession. The Belgians and Dutch are sticking to Del Ponte's message, however, insisting that no SAA be signed until Serbia hands over the remaining defendants.

Just days before his trip to Brussels to meet with the EU Enlargement Commissioner and foreign policy chief, the new Chief Prosecutor issued a statement heralding the capture of the four remaining fugitives as the "absolute priority" of the Tribunal. While Del Ponte was renowned for her public criticism of Serbia, Brammertz is known for subtle diplomacy and quiet work behind the scenes. Hopefully, Serbia will respond positively to Brammertz's style of persuasion, and the outstanding indictees will stand trial at the Tribunal.

## INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

### MIKAELI MUHIMANA V. THE PROSECUTOR, CASE NO. ICTR-95-1B-A

On May 21, 2007, the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) issued its judgment in the case *Mikaeli Muhimana v. the Prosecutor*. The Accused had appealed from an April 28, 2005 conviction for genocide and the crimes against humanity of rape and murder, for which he had received multiple life sentences. A majority of the Appeals Chamber reversed the factual findings of the Trial Chamber regarding two acts of rape and one act of murder, but affirmed the sentences of life imprisonment for each of Muhimana's convictions.

Among the grounds of appeal submitted by Muhimana against his April 2005 conviction was the claim that the Trial Chamber erred in law and in fact by finding that he had the intent to commit genocide, when it was established at trial that, *inter alia*, he had a Tutsi wife whom he protected through the end of the war and that he had saved other individual Tutsis. The Appeals Chamber unanimously rejected this claim, noting that the Trial Chamber made a number of findings in support of its conclusion that the Appellant participated in killing and seriously injuring Tutsi victims with the intention to commit genocide, and stating that "evidence of limited and selective assistance towards a few individuals does not preclude a trier of fact from reasonably finding the requisite intent to commit genocide."

Muhimana also raised several claims of legal and factual errors based on the Trial Chamber's assessment of different witnesses. Nearly all of these claims were dismissed on the grounds that the Appellant failed to demonstrate either "that no reasonable trier of fact could have reached the finding" based on the challenged testimony, or that "the error occasioned a miscarriage of justice." However, a majority of the Appeals Chamber did agree with Muhimana that the Trial Chamber erred in fact when convicting the Appellant for two rapes based on the testimony of someone who was not an eyewitness to the alleged crimes. While the Appeals Chamber noted

that it is permissible to base a conviction on circumstantial evidence, and that the witness did provide sufficient evidence to establish that two victims were raped inside the Appellant's home, the testimony was insufficient to establish that it was the Appellant, as opposed to another perpetrator, that committed the crimes. Accordingly, the Appeals Chamber reversed the factual findings relating to these two rapes. Nonetheless, it modified neither the Appellant's conviction for rape as a crime against humanity, nor the sentence imposed by the Trial Chamber for that crime, as the conviction was based on a finding that Appellant had committed 12 acts of rape, only two of which were reversed. Judges Shahabuddeen and Schomburg dissented, arguing that it was the Trial Chamber, and not the Appeals Chamber, that was in the best position to determine whether the facts sufficiently established Muhimana's role in the alleged crimes.

The Appellant was also successful in his claim that the Trial Chamber erred in finding that he had killed a particular individual, namely a pregnant woman, in mid-May 1994 on Rugona Hill, because the indictment failed to give the Appellant proper notice of the time and place of the alleged crime and his alleged role in it. The Appeals Chamber found that the indictment was in fact defective and that, contrary to the findings of the Trial Chamber, the defect had *not* been cured through information included in a Pre-Trial Brief. The Appeals Chamber recognized that, under some circumstances, a defective indictment may be cured by information such as a summary of anticipated testimony submitted in a Pre-Trial Brief, but in this case, the information provided in the brief did not "simply add greater detail in a consistent manner with a more general allegation already pleaded in the Indictment, [but] ... modify[ed] the time, location, and physical perpetrator, matters that were already specifically pleaded in the Indictment, albeit in a materially different manner." As a result, a majority of the Appeals Chamber invalidated Muhimana's conviction on one count of murder as a crime against humanity. Once again, however, the Appeals Chamber found that the error neither invalidated the Appellant's conviction for murder as a crime against humanity — as the conviction was based

on several murders — nor the sentence of life imprisonment for the conviction. Judge Schomburg dissented from the majority, finding that the defect in the indictment had been cured because the information contained in the Pre-Trial Brief informed the Appellant clearly, consistently, and in a sufficient manner about the crime for which he was charged, as well as the place and time at which the crime occurred.

Finally, the Appellant claimed that the Trial Chamber erred in sentencing him to life imprisonment on the grounds that the Chamber failed to consider mitigating circumstances in violation of Article 23 of the ICTR Statute. Muhimana argued that several factors should have mitigated his sentence, including the fact that he had no prior criminal convictions; he was only 33 years old during the relevant period; he is the father of nine children; that he protected several Tutsis during the events of 1994; and that he occupied a low position in the Rwandan administrative structure at the time of his crimes. The Appeals Chamber rejected the Appellant's claims, explaining that: (i) the record did not show that Muhimana offered substantiating evidence in support of his alleged mitigating factors prior to sentencing; (ii) although the Trial Chamber is required to *consider* mitigating circumstances, it is under no obligation to actually mitigate a sentence based on the factors offered; and (iii) even when mitigating circumstances exist, a Trial Chamber can impose a life imprisonment sentence when the gravity of the crimes so requires. The Appeals Chamber noted that the Appellant made no allegations challenging the gravity of his crimes.

#### **ALOYS SIMBA V. THE PROSECUTOR, CASE No. ICTR-01-76-A**

The Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) affirmed the Trial Chamber's conviction of Aloys Simba on November 27, 2007. A retired lieutenant colonel and member of the "Comrades of the fifth of July," the group responsible for the *coup d'état* that brought former President Juvenal Habyarimana to power in 1973, Simba was also a member of parliament from 1989 to 1993. The Trial Chamber found the Appellant guilty of genocide and extermination as a crime against humanity

based on his participation in a joint criminal enterprise (JCE) to kill Tutsi civilians at Murambi Technical School and Kaduha Parish. He was sentenced to 25 years in prison for his crimes. Simba challenged the Trial Chamber's judgment and his sentence based on fourteen separate grounds of appeal, all of which were dismissed by the Appeals Chamber. The Prosecutor also challenged Simba's sentence, saying that a single sentence of 25 years was insufficient. Again, the Appeals Chamber dismissed this ground of appeal.

Among the grounds of appeal raised by Simba was the claim that he was denied a fair trial because two witnesses refused to appear before the Tribunal to testify in his defense. According to Simba, these witnesses, referred to as BJK1 and HBK, were prevented from testifying due to the "interference" of Rwandan government officials. The Appeals Chamber stated that it could conceive of situations where a fair trial would not be possible because "witnesses crucial to the Defense case refuse to testify due to State interference." However, to establish such a claim, it is incumbent on the Defense to demonstrate that such interference in fact took place, and that the Defense "exhausted all available measures to secure the taking of the witnesses' testimony." In Simba's case, the Appeals Chamber first found that the Appellant had not fulfilled his burden of establishing that Witness BJK1's refusal to testify was a result of government interference. By contrast, the Appeals Chamber agreed with the Trial Chamber that there was evidence that the government interfered with Witness HBK's testimony. However, the Appeals Chamber also agreed with the lower court that the witness's testimony would likely have been of limited probative value. Furthermore, the Appeals Chamber found that the Defense had failed to exhaust all available measures to secure the taking of the witness's testimony. Hence, Appellant's challenges based on the unavailability of witnesses in his defense were dismissed.

The Appellant also raised several challenges to his conviction for genocide and extermination as a crime against humanity pursuant to a JCE. Among these challenges was a claim that an accused cannot be held responsible under a JCE theory of liability unless the accused participated in the planning of the JCE itself. Specifically,

Appellant pointed to the fact that the Trial Chamber held that he was criminally liable for crimes committed at Murambi Technical School and Kaduha Parish, despite finding that the evidence failed to establish that the Appellant was either the “architect” of the attacks or that he “played a role in their planning.” However, the Appeals Chamber determined that it is “well-established that it is not necessary for a participant to have participated in the planning of a JCE in order to be convicted for participation in it.” Simba also claimed that the Trial Chamber erred in finding that he “shared the common purpose of killing Tutsi” in Murambi and Kaduha merely as a result of his presence and conduct in those areas. The Appeals Chamber rejected this argument, stating *inter alia* that Simba was found not only to have been present at the two massacre sites, but also to have distributed weapons and encouragement to the assailants, and thus it was reasonable to conclude that the Appellant shared the intent to carry out the common purpose of killing Tutsi at Murambi Technical School and Kaduha Parish.

Finally, the Appellant raised a number of challenges to his conviction for genocide with respect to the massacres at Murambi and Kaduha Parish. For example, he argued that the Trial Chamber erred by not requiring the Prosecution to prove the existence of a plan or policy as a fundamental element of the crime of genocide. The Appeals Chamber easily dismissed this challenge, noting that under the jurisprudence of both the ICTR and the International Criminal Tribunal for the former Yugoslavia, the existence of an agreement or a plan is not an element required for a conviction of genocide. The Appeals Chamber also rejected the Appellant’s claim that the specific intent to commit genocide must be formed *prior* to the commission of genocidal acts, holding that the Trial Chamber correctly held that it is the existence of the intent to commit genocide at the moment the acts are committed that matters.

**SPECIAL COURT FOR SIERRA LEONE  
PROSECUTOR V. MOININA FOFANA  
AND ALLIEU KONDEWA, CASE NO.  
SCSL-04-14-T**

On August 2, 2007, the Trial Chamber of the Special Court of Sierra Leone (SCSL) delivered its judgment in the case of *Prosecutor v. Moinina Fofana and Allieu Kondewa*. The case, which was the second case to conclude at the SCSL trial level, involved the conviction of two top members of Sierra Leone’s Civil Defense Forces (CDF), a paramilitary organization that fought in support of the elected Sierra Leonean government during the country’s civil war. Each was convicted by a majority of the Trial Chamber of either committing or bearing superior responsibility for the following acts in violation of Article 3 Common to the Four Geneva Conventions of 1949 and of Additional Protocol II to those Conventions: murder, cruel treatment, pillage and issuing collective punishments. In addition, Kondewa was convicted on one count of “other serious violations of international humanitarian law” in the form of conscripting child soldiers. Both men were unanimously acquitted of the crimes against humanity of murder and other inhumane acts, as well as the war crime of terrorism. Justice Bankole Thompson partially dissented from the judgment, writing a separate opinion in which he would have acquitted Fofana and Kondewa on all counts based, *inter alia*, on findings that their acts were dictated by necessity and thus were legally defensible. Justice Thompson also concluded that the Accused benefited from a defense referred to as *salus civis suprema lex est*, which means “the safety of the state is the supreme law.”

Initially, the CDF trial involved three accused: Sam Hinga Norman, who was the National Coordinator of the CDF; Fofana, the National Director of War; and Kondewa, who was High Priest of the CDF. However, Norman died in surgery in February 2007, while the trial was ongoing, and the Trial Chamber terminated his proceedings three months later. According to the indictments against Norman, Fofana, and Kondewa, each was responsible for eight counts of crimes against humanity, war crimes, and other inhumane acts. The Prosecutor charged that each Accused bore criminal responsibility because, *inter alia*,

the alleged crimes were committed as part of a joint criminal enterprise (JCE), or were a reasonably foreseeable consequence of that enterprise. The common “plan, purpose or design” of the CDF, according to the Prosecutor, was to “use any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone.” Notably, Trial Chamber II of the SCSL, which presided over the trial against the Armed Forces Revolutionary Council (AFRC), had refused to consider JCE as a theory of criminal liability in that case on the grounds that the common plan described in the AFRC indictment — namely, to gain and exercise political power and control over the territory of Sierra Leone — was “not inherently criminal.”

Fofana raised a similar challenge in the CDF case, arguing *inter alia* that the Prosecutor did not plead the “alleged criminal purpose of the JCE” with sufficient specificity. However, despite the similar descriptions of the underlying “plan, purpose or design” in the two cases, Trial Chamber I, without directly responding to Fofana’s challenge regarding the “alleged criminal purpose of the JCE,” refused to dismiss the JCE charges in the CDF case. Nevertheless, in analyzing the alleged criminal responsibility of Fofana and Kondewa for any given act, the Chamber repeatedly found that “[a]lthough on the basis of the evidence adduced it appears that Norman, Fofana, Kondewa and their subordinates may have acted in concert with each other, we find that there is no evidence upon which to conclude beyond reasonable doubt that they did so in order to further a common purpose, plan or design to commit criminal acts.” Thus, neither Fofana nor Kondewa were convicted for any crime on the basis of a JCE theory of liability.

With respect to the four counts of war crimes for which the Accused were convicted, the Chamber found that between November 1997 and December 1999, Fofana and Kondewa were responsible, at times directly and at times through their roles as superiors, for acts of murder, cruel treatment, pillage, and issuing collective punishments in violation of Common Article 3 of the Geneva Conventions and of Additional Protocol II. These acts included the killing of captured enemy combatants

and “collaborators,” infliction of suffering or injury upon them, and destruction of their houses. The Trial Chamber acquitted both Fofana and Kondewa of aiding and abetting the war crime of terrorism based on a finding that it had not been proved beyond a reasonable doubt that the primary perpetrator, Norman, acted with the specific intent to spread terror, and that therefore it had not been proved beyond a reasonable doubt that Fofana and Kondewa had the requisite knowledge to be convicted of aiding and abetting terrorism as a war crime.

The Trial Chamber also unanimously acquitted both Fofana and Kondewa of the charges of murder and other inhumane acts as crimes against humanity because, despite establishing that the alleged acts formed part of a widespread attack, the Prosecutor failed to prove that “the civilian population was the *primary object* of the attack.” In reaching this conclusion, the Court noted the Prosecutor’s admission that the CDF had “fought for the restoration of democracy.”

Finally, Trial Chamber I convicted Kondewa of committing other serious violations of international humanitarian law through his conscription and use of child soldiers under the age of 15. Fofana was acquitted under this charge, based on a finding of insufficient evidence, despite factual findings by the Court that Fofana had been in the presence of child soldiers at the headquarters for the CDF High Command and had attended a meeting at which Norman had stated that the “adult fighters were doing less than the children.” By contrast, the Chamber found that, as the CDF’s High Priest, Kondewa was in charge of initiating new members into the CDF, which included children under the age of 15. These children did not merely partake in a “societal initiation,” the Chamber held, but were given a potion to rub on their bodies for strength, put into military training and forced to participate in battle. Kondewa also used children at checkpoints and as bodyguards, supplying them with knives and guns. The Chamber found that Kondewa was aware that many of the CDF’s soldiers were younger than 15, noting that children as young as seven danced before him prior to battle.

A sentencing hearing was held several weeks after the conviction of Fofana and Kondewa, and on October 9, 2007, the Trial Chamber issued its sentencing judgment. Although the Chamber handed down separate sentences, ranging from three to eight years, for each guilty count entered against Fofana and Kondewa, respectively, it ordered that the sentences be served concurrently. Thus, Fofana will serve a total of six years, and Kondewa a total of eight years, with credit for time served since taken into custody on May 29, 2003. These sentences stand in sharp contrast to those handed down to each of the convicted members of the AFRC group in July 2007, which range from 45 to 50 years’ imprisonment. The Trial Chamber in the CDF case explained the relatively lenient sentences given to Fofana and Kondewa by stating that harsh sentences would be counterproductive to deterrence and the Court’s overall objectives of justice, peace and reconciliation. In determining the appropriate sentences, the Chamber took into account the motivation of each accused to reinstate democracy and the surrounding circumstances of the war. It acknowledged the “justice or propriety” of pro-democracy armed forces, but also stated that the laws of war must be observed even when a group is defending legitimate causes.

#### **INTERNATIONAL CRIMINAL COURT PROSECUTION OF SEXUAL VIOLENCE IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

The International Criminal Court (ICC) has received much criticism due to the narrow focus of its efforts to bring justice and accountability to the situation in the Democratic Republic of the Congo (DRC). Specifically, until the fall of 2007, the Prosecutor’s investigations into widespread violations in the DRC resulted in the issuance of an arrest warrant for only one individual, Thomas Lubanga Dyilo, for the conscription of child soldiers during his role as leader of the Union of Congolese Patriots. The arrest warrant failed to adequately address the broad range of violations attributable to parties to the conflict in the Ituri region of Eastern DRC.

ICC critics were partially mollified by the arrest and transfer of a second accused, General Germain Katanga, chief of staff of

the Patriotic Force of Resistance in Ituri, to the ICC’s detention center at Scheveningen in October 2007. Katanga’s arrest warrant notes that there is reason to believe he is responsible for a number of crimes falling within the ICC’s jurisdiction. The case against Katanga seems, therefore, to more accurately reflect the full scope and gravity of violations reported than did charges against Lubanga. Although reports indicate that crimes of a sexual nature have been rampant in the DRC, the Prosecution did not include them among the charges against Lubanga for reasons that may be related to the availability of evidence. The decision not to include the charges may have also been based on Moreno-Ocampo’s Prosecutorial Strategy of focused investigations and prosecutions, in which a limited number of incidents and witnesses are selected to permit expeditious trials. The broader charges against Katanga may signify a shift away from the strategic focus on a limited sample of incidents and types of criminality. Katanga is charged with the sexual enslavement of women and girls both as a crime against humanity and as a war crime.

The prosecution of sexual violence in armed conflict is critical due to the alarming rate at which militant groups are employing sexual violence as a strategy for attaining military objectives. Authorities agree that the scale and brutality of sexual violence in the DRC indicates the existence of coordinated strategies whereby militant groups seek to gain military advantage by terrorizing, weakening, and destroying civilian communities through sexual violence. International law emphatically prohibits such conduct, as evidenced in both custom and treaties.

Sexual violence during armed conflict has been prohibited since as early as the fifteenth century when 27 judges of the Holy Roman Empire convicted Peter van Hagenbach, a knight acting under the command of the Duke of Burgundy, because he allowed his troops to rape and kill civilians during the siege of a German town. Eminent publicist Hugo Grotius reaffirmed this prohibition in the mid-seventeenth century, and this prohibition is reflected in many domestic manuals, including the influential 1863 U.S. Lieber Code that governed American Civil War soldiers’ conduct. By the middle of the twentieth

century, many national courts had confirmed that rape constitutes not only a violation of the laws and customs of war, but also gives rise to individual criminal responsibility. Authorities including the International Committee of the Red Cross (ICRC), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Rome Statute of the ICC have noted that the act of rape constitutes the willful infliction of “great suffering” amounting to a grave breach of the Geneva Conventions. Finally, sexual violence is prohibited under the Rome Statute. Katanga, for example, is charged specifically with the sexual enslavement of women and girls, punishable both as a crime against humanity under Art. 7(1)(g) of the Rome Statute, and as a war crime under Art. 8(2)(b)(xxii).

Despite the deep-rooted prohibition on sexual violence in armed conflict, the practice continues to constitute a disturbingly common tactic employed by warring factions in the central African conflicts that have given rise to ICC investigations and arrest warrants. This is evidenced in part by the outstanding arrest warrants for Joseph Kony and Vincent Otti of the Ugandan rebel group, the Lord’s Resistance Army, and Ahmed Harun and Ali Koshayb of Sudan — all charged with crimes of sexual violence. In the DRC, organizations serving victims of sexual violence estimate that 14,000 rapes have occurred in North Kivu since 2004, and around 1,400 in the past six months alone. Katanga’s trial represents the ICC’s first opportunity to bring its own formulation of this centuries-old prohibition to bear on the continuing and unlawful use of sexual violence in armed conflict.

#### **NEXT STEPS AND NEW INVESTIGATIONS IN THE DARFUR SITUATION**

Further steps the Office of the Prosecutor took last fall that sought to improve the ICC’s effectiveness involved increasing pressure on Sudan to cooperate with the outstanding arrest warrants, and promising to open up new investigations in the Darfur Situation. On December 6, 2007, in the Prosecutor’s sixth address to the Security Council on Darfur, he stressed that Sudan “is not fulfilling its duty to protect its citizens, and is allowing members of the government to attack them.” Highlighting

what many see as Sudan’s flagrant disregard for United Nations (UN) efforts to intervene through diplomacy and the ICC, the Prosecutor deplored Sudan’s failure to protect its citizens and failure to cooperate with the ICC in continuing “in full sight of the international community.”

The Prosecutor called on the Security Council to send a strong and unanimous message to the Sudanese government to comply with Resolution 1593 and execute arrest warrants for Ahmed Haroun, Minister of State for Humanitarian Affairs, and Ali Kushayb, a Janjaweed militia leader, who the Sudanese government recently released from prison despite the ICC arrest warrant. Most Security Council members, other attending UN Member States, and non-governmental organizations (NGOs) responded by urging support for the ICC, but the statement was soon abandoned due to Chinese and Russian opposition. While this was a disappointing show of political will, human rights groups have noted that the statement would not have added to Sudan’s existing obligation under Security Council Resolution 1593 to comply with the ICC’s arrest warrants with respect to the Darfur crisis.

The Prosecutor also announced plans to investigate two new cases. The first involves ongoing attacks on Sudan’s internally displaced persons living in temporary camps. He emphasized that the evidence indicates “[a] calculated, organized campaign by Sudanese officials to attack individuals and further destroy the social fabric of the society.” The evidence, he says, “points not to chaotic and isolated acts, but to a pattern of attacks.” Notably, the Prosecutor attributes the attacks to the Sudanese government. He has indicated that he will trace responsibility up the chain of command and seek to identify “[those] bearing the greatest responsibility for ongoing attacks against civilians; [those] ... maintaining Haroun in a position to commit crimes, [and those] ... instructing.”

Such an investigation, if pursued, would represent an aggressive approach to stemming the flow of tolerance that characterizes political and military command structures that allow or condone grave violations of the rules of armed conflict protecting civilians. As many critics note,

while it is important to try military commanders for improper conduct, impunity must end for political leaders that plan and sponsor armed hostilities in violation of international law.

The Prosecutor’s second new investigation involves attacks on humanitarian workers and peacekeepers. In particular, the Prosecutor plans to investigate an attack on African Union peacekeepers in Darfur that left ten dead and eight wounded last fall. For aid groups and peacekeepers to function properly in armed conflict, international law prohibits armed groups from subjecting them to military attack. Where mass atrocities have caused the deaths of 250,000 people and displaced 2.5 million, the importance of such an investigation rests in large part on its power to deter future attacks. This is critical to allowing humanitarian workers to function *during* armed conflict and to stymie the escalation of civilian damages. Otherwise, humanitarian workers are largely limited to repairing avoidable damages after hostilities cease.

#### **THE ASSEMBLY OF STATES PARTIES**

The ICC’s governing body, the Assembly of States Parties (ASP) to the Rome Statute, concluded its sixth meeting in December 2007 at UN Headquarters in New York. The ASP elected three new judges to replace judges who resigned before the end of their nine-year terms. Fumiko Saiga of Japan will finish Judge Claude Jorda’s term and is eligible for re-election for an additional nine-year term. Bruno Cotte of France will serve the remainder of Judge Maureen Clark’s term, and Daniel David Nsereko of Uganda will replace Judge Karl Hudson-Phillips. The ASP enhanced the Trust Fund for Victims to allow greater flexibility for earmarking donations and adopted a recommendation of the Committee on Budget and Finance not to provide increased resources for legal aid in the Office of Public Counsel for the Defense.

The Special Working Group on the Crime of Aggression continued discussing definitions of aggression; the ASP appointed a Focal Point on cooperation, emphasized as a result of Sudan’s defiance of ICC arrest warrants; the ASP increased assistance to ICC outreach activities; and the Prosecutor announced new investiga-

tions on three continents — one of which is thought to be Latin America, where a delegation has met with victims and officials in Colombia. Finally, the ASP welcomed Japan and Chad as new States Parties, bringing the total number of ratifications of the Rome Statute to 105.

## HYBRID AND INTERNATIONALIZED TRIBUNALS

### THE SPECIAL TRIBUNAL FOR LEBANON

The United Nations (UN) recently took important steps to create a Special Tribunal for Lebanon to try those accused of the 2005 assassination of former Lebanese Prime Minister Rafik Hariri. A divided Lebanese Government failed to agree on a tribunal. As a result, in early May 2007 current Lebanese Prime Minister Fouad Siniora sent a letter to UN Secretary-General Ban Ki-moon requesting the UN establish the tribunal as a matter of urgency. On May 30, the UN Security Council adopted a resolution formally endorsing the tribunal's creation; ten Council members voted for the resolution and five abstained.

The tribunal's mandate is to try individuals suspected of assassinating Hariri, killed on February 14, 2005, when explosives were set off as his motorcade drove through Beirut. The tribunal has the authority to try those responsible for other assassinated Lebanese political leaders. A minority of Lebanese judges and a majority of foreign judges will sit in each chamber of the international hybrid tribunal. According to UN Security Council Resolution 1664 (2006), the tribunal will be "of an international character based on the highest international standards of criminal justice." Although international in nature, the Special Tribunal will implement Lebanese law. The harshest penalty the tribunal can administer is life imprisonment.

In late December 2007, the UN reached an important agreement with the Dutch government to house the tribunal in Leidschendam, a city bordering The Hague. The tribunal will be located in a building that until recently housed the Dutch AIVD intelligence service. The Netherlands stipulated that as a condition for hosting the tribunal, convicted

persons would not serve sentences in the Netherlands. Moreover, the Netherlands requires the UN and its member states to finance the tribunal, not the Dutch government. Mr. Ban estimates the tribunal will cost \$120 million over three years. UN member states have already donated \$30 million. Once the Dutch Parliament ratifies the agreement it will be officially finalized.

In a January press conference, Mr. Ban announced the tribunal's creation and affirmed that the UN and the Lebanese government were making "good progress" coordinating efforts. Nevertheless, he was concerned that Lebanese legislators failed to resolve the deadlock over the election of a new Lebanese president. Internal governmental strife will make it difficult for Lebanon to fully assist the UN in its investigation. Mr. Ban noted that he would announce the names of the tribunal's judges once preparations were complete.

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

On October 4, 2007, the Appeals Chamber of the War Crimes Chamber of the State Court of Bosnia-Herzegovina (WCC) confirmed its conviction of former Serb military member Radisav Ljubinac, for persecuting Bosniak civilians in the Rogatica Municipality while acting in his official capacity. Ljubinac was convicted, on the basis of aiding and abetting, of three counts of crimes against humanity as persecution: 1) participating in forcible relocation of Bosniak civilians; 2) committing inhumane acts of violence against detained civilians in the Rasadnik camp, with the intent of inflicting great suffering; and 3) transferring 27 civilians to the village of Duljevac, where Serb forces used them as human shields and later executed them. Ljubinac received a sentence of ten years imprisonment for his crimes.

The Prosecution had to establish that Ljubinac committed criminal offenses outlined in Article 172 of the Criminal Code of Bosnia-Herzegovina (CC BiH) and that the chapeau elements of crimes against humanity were present. The chapeau elements require that there be a widespread or systematic attack; that the attack be directed against any civilian population;

that the Accused know of such an attack; that his acts be part of the attack and that the accused know that his acts were part of the attack. To prove the crimes were committed as acts of persecution, the Prosecution had to establish that Ljubinac acted with discriminatory intent against the victims because they were part of a political, racial, ethnic, religious, national, cultural, gender or otherwise identifiable group, and that discriminatory acts resulted in the deprivation of a fundamental human right.

The Prosecution sought to prove a widespread or systematic attack took place against Bosniak civilians in Rogatica by establishing judicial notice of that fact, as proven by the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v. Momcilo Krajisnik*. Article 4 of the Law on the Transfer of Cases (which governs Rule 11 *bis* transfers of accused from the ICTY to the WCC) allows the Court "to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY . . ." The Prosecution must move to have the requested facts established as evidence, and the defense is given an opportunity to rebut alleged facts. Establishing judicial notice of facts proven by the ICTY has been an important tool for making the trials more efficient.

Another key issue raised in most WCC trials is the question of which law to apply. The Defense, employing a principle of legality argument, claimed the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY) should be utilized, since that criminal code was in force at the time the crimes were committed. Under the CC SFRY, the category of crimes against humanity did not exist. The Trial Chamber held that the CC BiH applies, adopted in 2003 to govern all WCC trials.

Although crimes against humanity were not codified in the CC SFRY, such crimes were established as a part of customary international law when the accused committed them. As such, the court concluded, the principle of legality is kept intact through the application of the CC BiH. Moreover, the acts were codified as specific crimes under the CC SFRY. Under Article 4 of the CC BiH, if a law has been amended after the perpetration of a crime,

the law that envisages the more lenient punishment should be applied. The court stayed true to this principle as well. Under the CC SFRY, the applicable punishment was the death penalty, but under the CC BiH, Ljubinac received the more lenient punishment of ten years' imprisonment.

Strong evidence from victims or first-hand witnesses exists proving Ljubinac's role in aiding and abetting in the crimes of persecution of forcible transfer of Bosniak men, women, and children, the severe beatings of civilian detainees, and the transfer of a group of 27 civilians to Duljevac where they were used as human shields and later executed. The Court identified two main aggravating factors; first, it considered forcible transfer an especially grave crime, as it enabled the greater plan of ethnic cleansing. Second, aiding in the severe beating of helpless civilians and their use as human shields exemplified a high level of cruelty, and commission of those crimes as persecution further aggravated the circumstances. Ljubinac was acquitted of three counts of crimes against humanity, including other acts of persecution and murder, due to a lack of evidence.

On appeal, the Defense again raised the applicability of the CC BiH. Using the same rationale as the Trial Chamber, the Appellate Chamber confirmed that the CC BiH was correctly applied. The Prosecution argued there was sufficient evidence to convict Ljubinac on the three acquitted charges, but the Appellate Chamber confirmed the Trial Chamber's ruling that a lack of evidence existed proving the accused's guilt beyond a reasonable doubt.

The Prosecution then argued for a longer sentence. The Trial Chamber had viewed Ljubinac's alcoholism as a mitigating factor in the sentencing, reasoning that the accused's desire to become a valued member of an organization (the Serb military) should be viewed as a consequence of his disease and the resulting social stigma, and therefore not entirely in his control. The Appellate Chamber disagreed, saying, "[T]he Prosecutor is right when stating that excessive drinking before the war cannot be taken as a mitigating circumstance on the part of the Accused when meting out the punishment." Nonetheless, the Appellate Chamber considered the ten-

year sentence to be appropriate considering that the accused did not have a high level of intent and was not the organizer of the entire criminal activity in question.

### **THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

On Christmas Day 2007, protestors in Cambodia marched in Phnom Penh to demonstrate their desire for a speedier resolution to the trials of five former Khmer Rouge leaders. The protestors' displeasure with the current process is illustrative of various problems the ECCC faces, most recently with funding. Although the tribunal is budgeted \$56.3 million, a heavy workload means it will operate through 2010, as opposed to the original 2009 deadline. Peter Foster, a UN-appointed spokesman for the tribunal, predicts the current funds may only last another six months because of unexpected costs. For example, the tribunal currently employs only 14 translators but needs at least 40 to translate the 300,000 pages of Cambodian-language documents into English.

Donor support was shaken after two UN reports in 2007 raised doubts about the tribunal's administration. Specifically, a UN audit last spring found that Cambodian staff were often under-qualified and that the tribunal paid inflated salaries to Cambodians. Despite such problems, the UN is planning a major fund-raising drive that may bring the budget to over \$120 million. Even the United States, which made no contributions to the original budget, is considering a donation. Joseph Mussomeli, U.S. ambassador to Cambodia, made evident the United States' reticence to give, stating in a December 26, 2007 article from the Associated Press, "It would simply be irresponsible to suggest using American taxpayer money until we're sure that the administrative process is also fixed." Such doubts notwithstanding, it is ultimately a positive sign that the United States is considering a donation at all.

Despite the tribunal's problems, it has also made important progress in recent months. The ECCC held its first public session on November 20, 2007, a pre-trial hearing for Kaing Guek Eav, also known as Duch. He is charged with crimes against humanity for his activities as head of the infamous S-21 prison at Tuol Sleng, where

regime officials tortured and killed thousands of Cambodians. Duch requested bail ahead of his trial, scheduled to begin this year. Journalists, international observers and Cambodian citizens alike packed the tribunal's compound.

Duch argued he should be released on bail because he had already been detained for over eight years without a trial. The 66-year-old has been detained since 1999 for charges the Cambodian government brought against him, and was transferred to the ECCC's custody in late July 2007. On December 3, 2007, the five-judge panel, composed of three Cambodian judges and two UN-appointed international judges, unanimously ruled that Duch should remain in detention, concluding that if Duch were allowed to go free, his life could be in danger, he could try to flee the country, and he could constitute a threat to other witnesses.

The ECCC has also been bolstered by the recent detention of three senior Khmer Rouge leaders. Before November 2007, Duch and Nuon Chea, known as "Brother Number Two" due to his service as Pol Pot's second in command, were the tribunal's only detainees. On November 12, 2007, Ieng Sary, who served as foreign minister for the Khmer Rouge regime, and his wife Ieng Thirith, who served as minister for social affairs, were arrested at their home in Phnom Penh. The next day Sary was charged with war crimes and crimes against humanity, while Thirith was charged solely with crimes against humanity. Sary allegedly perpetrated murders and assisted in policies of forcible transfer and forced labor. Thirith is suspected of orchestrating purges and the murders of various members of the Ministry of Social Affairs.

A week later, former Khmer Rouge head of state Khieu Samphan was arrested at a hospital in Phnom Penh. The 76-year-old had been flown to a hospital in Cambodia's capital the week before after suffering a stroke. Samphan became president of Democratic Kampuchea (as Cambodia was referred to at the time) when the Khmer Rouge ascended to power. He has consistently argued that his role as president was merely ceremonial. Moreover, in his recent book *Reflection on Cambodian History up to the Era of Democratic Kampuchea*,

Samphan referred to Pol Pot as a patriot and claimed that in the Khmer Rouge government “[t]here was no policy of starving people. Nor was there any direction set out for carrying out mass killings.” Samphan was charged with crimes against humanity and war crimes for his role in the Khmer Rouge regime.

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## INTERNATIONAL LEGAL UPDATES *(Continued from page 37)*

takes concrete steps toward reform, such as freeing opposition leader and political prisoner Aung San Suu Kyi. Suu Kyi has been under house arrest since her National League for Democracy party won Burma’s last democratic parliamentary elections in 1990.

The secretive manner in which the Charter was drafted also hinders the ratification process. Civil service groups such as trade unions, alienated by the closed door sessions, actively oppose ratification without further input.

The Charter’s weak language and ASEAN’s undefined role necessitate strong leadership and vision from the Secretary General in order to mold ASEAN into a legitimate mechanism for upholding the rights of citizens. Described as a persuasive politician, Pitsuwan received his Ph.D. in political science and Middle Eastern studies from Harvard University in the United States, then ran for a position in the Parliament in his home town of Nakhon Si Thammarat, Thailand, where he served nine terms and was appointed Minister of Foreign Affairs. After leaving the foreign ministry in 2001, Pitsuwan was appointed as a member of the Commission

on Human Security of the United Nations and served as an advisor to the International Commission on Intervention and State Sovereignty, which produced the well-known *Responsibility to Protect* report. He also served on the International Labor Organization’s World Commission on the Social Dimension of Globalization.

Whether the new ASEAN charter remains just an academic assertion of lofty goals or an institution of fundamental human rights depends largely on the decisions made in the next five years. Commissioners from the national human rights organizations of Indonesia, Malaysia, Thailand, and the Philippines met on January 29 to establish a framework for the proposed regional body, the ASEAN Human Rights Commission. During the two-day meeting, the commissioners proposed that members of the Commission be appointed by their respective foreign ministries from a list of candidates drawn by a selection committee consisting of national institutions and civil society. The proposal will go back to the four existing national commissions and individual national governments for further discussion before being submitted to ASEAN as a whole.

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