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UPDATES FROM THE INTERNATIONAL CRIMINAL COURTS

International Criminal Tribunal for the Former Yugoslavia

Trial of Ante Gotovina

The trial of former Croatian General Ante Gotovina began on March 11, 2008. Following his secret indictment in 2001, Gotovina was on the run for four years before his apprehension at a luxury hotel in the Canary Islands. His trial is regarded as one of the most important prosecutions to date at the Tribunal because it will effectively try and pass judgment on approaches taken by the Croatian leadership during the conflict. The trial is certain to be followed closely in the former Yugoslavia because Gotovina is still considered by many Croats to be a national hero.

Gotovina has been indicted, along with two other Croatian Generals, Ivan Čermak and Mladen Markač, for crimes against humanity and war crimes as participants in a joint criminal enterprise with four deceased co-perpetrators — former President of Croatia Franjo Tudjman, Croatian Minister of Defense Gojko Šušak, and Chiefs of the Main Staff of the Croatian Army Janko Bobetko and Zvonimar Červenko. Gotovina was the overall operational commander of the major Croat offensive Operation Storm that was carried out over three days in August 1995. Operation Storm was designed to expel the Croatian Serb population from the Krajina region of Croatia. In September 1990, Croatian Serbs declared that the Krajina would henceforth be a Serbian Autonomous Region. Croatian leaders implemented several plans designed to retake the claimed territory but had little success until Operation Storm.

In anticipation of the strike, a campaign of fear and propaganda was mounted throughout the Krajina in an effort to evacuate the region. The campaign was largely successful, so much so that by the time Croatian forces arrived many Croatian Serbs had fled. During the offensive and its aftermath, Croat forces under Gotovina's command committed numerous atrocities in the region. The Croatian troops shelled civilian areas and conducted aerial attacks on fleeing civilians. Some individuals were shot execution style and others murdered in front of their families. The troops opened fire on groups of civilians and burned others alive. The attack was not limited to physical violence; advancing forces mounted an organized campaign of ethnic cleansing, systematically torching or otherwise destroying and plundering Serb villages, including those in the municipalities of Benkovac, Donji Lapac, Drniš, Ervenik, Gračac, Kistanje, Knin, Lišane Ostovičke, Lovinac, Nadvoda, Obrovac, Oklaj, Orlić, Polaca, Titova Korenica, and Udbina.

Gotovina, Čermak, and Markač are charged with participation in a joint criminal enterprise, the common purpose of which was the permanent removal of the Serb population from the Krajina by force, fear, or threat of force, persecution, forced displacement, transfer and deportation, appropriation and destruction of property, or other means. Gotovina was indicted for his direct and indirect acts. He allegedly participated in the planning and preparation for the campaign and exercised command and control over all units, elements, and members of the Croatian armed forces who participated in Operation Storm. He also allegedly permitted the aforementioned criminal activity to occur and failed to establish law and order among his subordinates.

Acquittal of Former Kosovar Prime Minister Ramush Haradinaj

On April 3, 2008 the Tribunal acquitted Ramush Haradinaj of all charges of crimes against humanity and war crimes. Haradinaj and two other high-ranking members of the Kosovo Liberation Army (KLA), Idriz Balaj and Lahi Brahimaj, were indicted for participation in a joint criminal enterprise with the aim of consolidating control over the Dukagjin area in northwest Kosovo by unlawful removal, mistreatment, and murder of Serbian and Kosovar Roma civilians as well as Kosovar Albanians considered sympathetic to their cause. The three were charged with 19 counts of violations of the laws and customs of war including murder, torture, rape, and cruel treatment. At the time the crimes allegedly took place, between March and September 1998, Haradinaj was commander of the KLA troops in the Dukagjin area. Haradinaj and Balaj — commanders of the Black Eagles, a KLA unit operating in Dukagjin — were both acquitted of all charges, but Brahimaj — Haradinaj's uncle and member of the KLA general staff stationed at the headquarters in Jablanica — was found guilty of cruel treatment and torture of two persons and sentenced to six years' imprisonment.

All three indictees were acquitted of crimes against humanity charges. The Trial Chamber was not convinced beyond a reasonable doubt that there existed a joint criminal enterprise with the objective of targeting civilians. The judges found that some evidence presented by the Prosecutor suggested some victims were targeted for individual reasons rather than as members of a specific civilian population. They also found that the scale of ill-treatment, forcible transfer, and killing of civilians not significant enough to conclude there had been an attack against a civilian population.

The trial of Haradinaj was notorious for witness intimidation. Throughout the trial, the Chamber had to deal with witnesses refusing to testify. The Chamber granted 34 witnesses protective measures to induce them to testify. Eighteen subpoenas were issued to witnesses who refused to testify. Two of those subpoenaed still refused, were indicted for contempt of court, and arrested and transferred to The Hague. The Chamber repeatedly heard from witnesses that they feared for their safety, perhaps for good reason. In early January, following testimony before the ICTY, leading prosecution witness Tahir Zemaj, as well as his son and his nephew, were shot and killed in Zemaj's car in Peja, Kosovo. Another prosecution witness, Kujtim Berisha, was hit by a car and killed in Montenegro two weeks before the trial began.

Trial of Serbian Secret Service Members: Stanišić and Simatović

The trial against two high level officials of the Serbian Secret Service began in April. Jovica Stanišić and Franko Simatović were indicted for crimes against humanity and war crimes for their participation as part of a joint criminal enterprise whose objective was the forcible and permanent removal of the majority of non-Serbs —principally Croats, Bosnian Muslims, and Bosnian Croats — from large areas of Croatia and Bosnia-Herzegovina, through the crimes of persecutions, murder, deportation, and other inhumane acts.

In the spring of 1991, the Serbian Secret Service established secret units to undertake special military action in Croatia and Bosnia-Herzegovina. Amongst these secret units were the notoriously brutal Arkan's Tigers and Martić's Police. Under the direction of Stanišić, Simatović set up training camps in the Krajina for the armed units. From 1991 to 1995, Stanišić and Simatovic´ allegedly directed, organized, equipped, trained, armed, and financed the secret units as they murdered, persecuted, and forcibly transferred non-Serbs. The October 1991 massacre at Hrvatska Kostajnica in Croatia is just one example of atrocities committed by a secret unit under their direction. Members of Martić's Police and other Serb forces were in control of the area, and most people in the region had fled during attacks the previous month. When secret units arrived, the remaining population was predominately women, elderly, and the infirm. Martić 's Police and other Serb forces rounded up 56 of the 120 people still in their villages, transported them to the village of Baćin, and executed them.

Additional Foča Judgments

Judgment in the cases of Mitar Rašević and Savo Todović were handed down by the War Crimes Chamber of the Court of Bosnia and Herzegovina (WCC) on February 28. The ICTY referred these cases to the Court under the Rule 98*bis* procedure in 2003 and 2005 respectively. The two defendants are named in a larger indictment of individuals involved in war crimes committed in the Bosnian town of Foča. The WCC found Rašević and Todović guilty of crimes against humanity committed against non-Serbs in the Foča Correctional Facility between April 1992 and October 1994. Rašević, the guards' commander, used the facility as a detention centre for non-Serb civilians. Todović, the deputy warden, participated in the creation and maintenance of a system of punishment and mistreatment of detainees. Both also helped establish a forced labor system.

The ICTY referred two other cases involving suspects indicted for crimes in Foča to the WCC. Gojko Janković and Radovan Stankovic´ were tried separately and found guilty of war crimes by that court. Janković was sentenced to 34 years' imprisonment, and Stanković to 20 years' imprisonment. In May 2007, however, Stankovic´ escaped from a prison in Bosnia's Republika Srpska where he was serving his sentence.

Completion Strategy and Instability in Serbia

Because the Tribunal is set to end its work in 2010, the United Nations Security Council authorized an increase of *ad litem* judges to sit in cases before the Tribunal to enable greater efficiency and the commencement of additional trials. The number of *ad litem* judges may be increased from 16 to 18 for 2008. Since its first hearing in November 1994, the Tribunal has indicted 161 persons for serious violations of humanitarian law committed in the former Yugoslavia between 1991 and 2001. Proceedings against 111 of these 161 have been completed.

Recent developments in Serbia have the international community concerned about the progress of the Tribunal with regards to Serbian cooperation. While Serbia had been moving towards greater integration with Europe, increasing pressure on the state to hand over the four remaining fugitives, Kosovo's declaration of independence delivered a heavy blow to these goals. Following Serbian Prime Minister Vojislav Kostunica's resignation in the wake of Kosovo's independence, President Boris Tadić dissolved the parliament and called for elections. Kostunica and other Serbian nationalists have vowed to halt Serbian integration into the European Union (EU) until the EU rejects Kosovo's split from Serbia. The ICTY's recent acquittal of Ramush Haradinaj — who was indicted for war crimes and crimes against humanity directed primarily at Serbians in Kosovo — has caused fury in Serbia. New ICTY Prosecutor Serge Brammertz's efforts in conjunction with persuasion by the international community, might help coax Serbia back into a relationship with the west. This might also rekindle Serbian cooperation in the apprehension of remaining fugitives, particularly former Bosnian-Serb President Radovan Karadzic and former Bosnian-Serb General Ratko Mladić respectively.

Special Court for Sierra Leone

Prosecutor v. Brima, Kamara & Kanu, Case No. SCSL-04-16-A

On March 3, 2008, the Appeals Chamber of the Special Court for Sierra Leone (SCSL) affirmed the Trial Chamber's conviction of Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu, senior members of the armed rebel group the Armed Forces Revolutionary Council (AFRC). Each was convicted in June 2007 on six counts of war crimes (terrorism, collective punishments, outrages upon personal dignity, pillage, murder, and mutilation); four counts of crimes against humanity (rape, extermination, murder, and enslavement); and one count of other serious violations of international humanitarian law (recruitment and use of child solders). Although both the Prosecution and the Defense submitted several grounds of appeal, this summary will focus on three of the more notable rulings of the Appeals Chamber.

First, the Appeals Chamber partially granted the Prosecutor's appeal against the Trial Chamber's dismissal of Count 7 of the Indictment — which charged the accused with the commission of "sexual slavery and any other form of sexual violence" as crimes against humanity — on the ground that the count violated the rule against duplicity. The Appeals Chamber began by reiterating that the rule against duplicity "applies to international criminal tribunals such that the charging of two separate offences in a single count renders the count defective." Applying this standard, the Appeals Chamber agreed with the lower court that Count 7 violated the rule, as "sexual slavery" requires "the exercise of rights of ownership over the victim," whereas "any other form of sexual violence" does not. The Appeals

Chamber, however, found that the Trial Chamber erred in quashing Count 7 in its entirety. Rather, based on the "evidence accepted by the Trial Chamber and the findings it had made," the lower court should have returned a verdict on the count of sexual slavery as a crime against humanity and struck out the charge of "any other form of sexual violence." Nevertheless, the Appeals Chamber held that it was not necessary to "substitute a conviction for sexual slavery as the Trial Chamber relied upon the evidence of sexual slavery to enter convictions for Count 9," which charged the offense of "outrages upon personal dignity" as a war crime.

The Prosecutor also challenged the Trial Chamber's dismissal of Count 8 of the Indictment, which charged Brima, Kamara, and Kanu with "other inhumane acts" (forced marriage) as crimes against humanity. The Trial Chamber had dismissed this charge on the ground that it was "redundant," saying that "other inhumane acts" as crimes against humanity should be read to *exclude* "crimes of a sexual nature" because such crimes were covered by the crime against humanity of "rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence." Furthermore, the Trial Chamber held that the Prosecution had failed to adduce any evidence with respect to forced marriage that was not already completely subsumed in the crime against humanity of sexual slavery. The Appeals Chamber disagreed. As an initial matter, it held that the jurisprudence of the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda demonstrated that the residual category of "other inhumane acts" has been "used to punish a series of violent acts that may vary depending on the context," and that therefore "the determination of whether an alleged act qualifies as an 'other inhumane act' must be made on a case-by-case basis taking into account the nature of the alleged act or omission, the context in which it took place, the personal circumstances of the victims . . . and the physical, mental and moral effects of the perpetrator's conduct upon the victims." Thus, the Appeals Chamber concluded that the Trial Chamber erred in law by finding that "other inhumane acts" as crimes against humanity must be "restrictively interpreted," noting that was no reason why the "'exhaustive' listing of sexual crimes under [the SCSL Statute] should foreclose the possibility of charging as 'other inhumane acts' crimes which may among others have a sexual or gender component."

The Appeals Chamber also took issue with the Trial Chamber's finding that forced marriage was subsumed in the crime against humanity of sexual slavery. According to the Appeals Chamber, the trial record contains "ample evidence that the perpetrators of forced marriages intended to impose a forced conjugal association upon the victims rather than exercise an ownership interest" in the victims. Although the Appeals Chamber did not define the concept of "forced conjugal association," it concluded that "forced marriage is not predominantly a sexual crime." Furthermore, the Appeals Chamber held that, while "forced marriage shares certain elements with sexual slavery," there "are also distinguishing factors." Thus, the Appeals Chamber concluded that the Trial Chamber "erred in holding that the evidence of forced marriage is subsumed in the elements of sexual slavery."

Lastly, the Appeals Chamber found that the evidence adduced at trial established that the three accused were criminally responsible for the crime against humanity of other inhumane acts (forced marriage). Yet the Appeals Chamber declined to enter new convictions against the three RUF members, finding that "society's disapproval of the forceful abduction and use of women and girls as forced conjugal partners as part of a widespread or systematic attack against the civilian population is adequately reflected by recognizing that such conduct is criminal."

Finally, the Appeals Chamber granted the Prosecution's appeal against the Trial Chamber's ruling that the Prosecutor had failed to properly plead participation in a joint criminal enterprise (JCE) because the purpose of the enterprise was not itself criminal in nature. In the Indictment against the AFRC leaders, the Prosecution had alleged that each accused participated in a JCE, the purpose of which was to "take any actions to gain and exercise political power and control over the territory of Sierra Leone." At trial, the defense had challenged these allegations on the ground that the purpose of the enterprise did not amount to a specific crime and thus was too broad to prove the existence of a JCE. The Trial Chamber agreed, dismissing the Prosecution's allegations regarding the JCE on the ground that they failed to "clarify what criminal purpose the parties agreed upon at the inception of the agreement." Yet the Appeals Chamber overturned this holding, saying "the requirement that the common plan, design or purpose of a joint criminal enterprise is inherently criminal means that it must either have as its objective a crime within the Statute, *or contemplate crimes within the Statute as the means of achieving its objective*." The Appeals Chamber, however, saw "no need to make further factual findings or to remit the case to the Trial Chamber," having "regard to the interest of justice."

International Criminal Court

The Cases in the Situation of the Democratic Republic of Congo

The trial of the first accused, Thomas Lubanga Dyilo, who is charged with recruiting child soldiers in the Democratic Republic of the Congo (DRC), was scheduled to begin in June 2008. On July 2, however, in a decision that ended one of the biggest controversies at the International Criminal Court (the ICC or the Court) yet, the Trial Chamber ordered the release of Lubanga. Two weeks earlier, the Trial Chamber halted the proceedings because the Prosecution did not make potentially exculpatory evidence available to the Defense, violating Article 67(2) of the Rome Statute, which requires the Prosecution to disclose any potentially exculpatory evidence.

The issue arose because of the Prosecutor's alleged over-use of Article 54(3)(e), which permits the Prosecution, in very limited circumstances, to obtain confidential evidence that will not be used in trial but requires that it only use this evidence to obtain further evidence. The Prosecution used this provision to obtain over 200 pieces of evidence from the United Nations and other sources in the DRC, some of which contain possibly exculpatory evidence, which can demonstrate the innocence of the accused, mitigate the guilt of the accused, or affect the credibility of the Prosecution's evidence. The sources will not give the Prosecutor permission to turn over the evidence to the Court, for

reasons that include the safety of sources and victims in the DRC. The Trial Chamber accused the Prosecution of abusing Article 54(3)(e) by using it beyond the intended limited circumstances and stated that because Lubanga does not have access to the evidence "a fair trial of the accused is impossible, and the entire justification for his detention has been removed." The Prosecution will have five days to appeal the decision. The Accused will remain in the Court's custody while the Appeals Chamber deliberates. At the time that the *Human Rights Brief* went to press, the Prosecution has appealed, and the Appeals Chamber has not yet released a decision.

Pre-Trial Chamber I of the ICC joined the two cases of *Prosecutor v. Germain Katanga* and *Prosecutor v. Mathieu Ngudjolo* Chui on March 10, 2008. A confirmation of charges hearing, originally scheduled for May 21, 2008, began on June 27, and is expected to last until July 16. During the hearing, the Pre-Trial Chamber will decide whether there is sufficient evidence for the Prosecutor to bring the case. Although cases are joined, the suspects shall be accorded the rights of individuals being tried separately. The Prosecution charges Katanga and Ngudjolo, members of Ituri Patriotic Resistance Force (FRPI) and the National Integrationist Front (FNI), respectively, with co-responsibility for crimes committed during and after a February 2003 joint attack on/in the village of Bogoro in Ituri.

On April 28, 2008, the Pre-Trial Chamber unsealed the arrest warrant of Bosco Ntaganda, also known as "The Terminator," who is also accused of enlisting and conscripting children and using them actively in hostilities in Ituri. Ntaganda was Deputy Chief of Staff for Military Operations of the Forces Patriotiques pour la Libération du Congo (FPLC) and was allegedly directly subordinate to Thomas Lubanga. The warrant had previously been sealed to prevent Ntaganda from fleeing after its release and to protect witnesses, but the Prosecution and Registry have confirmed that the situation on the ground has changed, making it safe to unseal the warrant at this time.

Outreach

The ICC's field Outreach Unit (the Unit) is charged with reaching out to the areas most affected by crimes that the ICC is prosecuting or investigating. The Unit's efforts are critical to overcoming one of the Court's most significant hurdles — ensuring that the justice meted out by the ICC in The Hague remains meaningful to people living in affected regions. This task includes providing victims with a meaningful sense of justice and ending perpetrators' expectations of impunity. In discharging its mission, the Unit convenes meetings and workshops for victims and civil society.

On February 15 and 18, 2008, the Unit, the ICC's Victims' Participation and Reparations Section, and local NGOs held two workshops in the Acholi sub-region of Uganda as part of the Unit's continued efforts to reach out to the most conflict-affected communities in Northern Uganda. Ninety local participants attended the workshop, including women, local leaders, and government officials from 19 sub-counties of the Pader and Kitgum districts. The Unit described the Court's role and work, including the main functions of its organs, the roles and rights of victims, and how affected individuals may receive information through the Unit. Leaders pledged continued commitment to assist disseminating accurate information about the ICC and urged the Unit to continue targeting communities at a grassroots level. Other participants noted that the workshops helped to dispel misconceptions about the court.

From February 18 to 20, 2008, the Outreach Unit held a civil-society workshop in Bangui, Central African Republic (CAR), where the Prosecutor's office is investigating the 2002-2003 conflict. The goal of the meeting was to develop an outreach strategy tailored to the CAR context, a goal the Unit sets for each context where it is active. In the CAR, the Unit provided members of civil society, including human rights groups, religious leaders, trade unions, youth groups, journalists, and lawyers, an opportunity to help shape the Court's future activity in the country.

In other outreach activities in the CAR, ICC Prosecutor Luis Moreno-Ocampo met with victims and members of civil society in affected areas. In mid-February, the Prosecutor answered questions in a dialogue that was broadcast through the Interactive Radio for Justice. He concluded by discussing the role of the ICC and reiterating its commitment to ending impunity. The Prosecutor also met with the government and held a press conference with local media.

The Unit teamed with the Victims Participation and Reparations Section to conduct meetings in Bunia, Ituri District, Orientale Province, and Béni, North Kivu Province, in the DRC between February 25 and March 3, 2008. Three hundred sixty-seven people in total attended the meetings aimed to raise awareness and provide information for communities affected by ICC proceedings. Key civil society groups, including human rights organizations, women's organizations, and former combatants, many of whom came from organizations based in other towns, attended the meeting in Bunia. The meetings provided information on recent developments in the cases of Thomas Lubanga Dyilo, Germain Katanga, and Mathieu Ngundjolo. The outreach mission also provided information on the process of victim participation.

The Béni outreach meeting followed the one in Bunia. While Béni suffered directly from fighting in the region, it has also been a place of refuge for thousands of people fleeing fighting in the bordering Ituri District. This was the first time that an ICC outreach mission traveled to Béni, and over the course of six meetings, ICC personnel met with representatives from human rights, development, and religious associations; legal practitioners, including the town's public prosecutor; representatives of women's associations; students; and journalists. Participants reported that the meetings dispelled misunderstandings about the ICC and reassured them about the court's transparency policy with regards to Lubanga's upcoming trial.

On March 24 and 25, 2008, the ICC organized outreach sessions for approximately 300 police officers from the Bunia garrison. Sessions dealt with general principles of individual criminal responsibility, emphasizing crimes falling within the court's jurisdiction. It was the first time that these officers, many of whom fought in militias before joining the national police force, attended an ICC outreach ses-

sions. Participants manifested a clear interest in the ICC and requested more outreach activities specially targeting women and youths to discourage them from joining militias that are still active in the region. They also agreed to continue supporting the Unit, urging it to continue engaging in direct dialogue with local communities.

The ICC continued outreach activities on March 29, 2008, initiating the first exchange between the Court and inhabitants of the village of Bogoro, the alleged theater of violent clashes that gave rise to Katanga's and Ngudjolo's prosecutions.

Uganda Peace Process

Relations between the ICC, the Government of Uganda and the Lord's Resistance Army (LRA) remain deadlocked with ICC warrants an apparent negotiating chip in the peace and disarmament deals between Uganda and the LRA rebels. The peace deals are slowly moving forward, however, creating subtle shifts in political tensions.

On February 19, 2008, the LRA and Government of Uganda signed an Annexture — an annex to the Agreement on Accountability and Reconciliation of June 29, 2007 as part of bilateral peace negotiations. Paragraph 7 of the Annexture provides that a special division of the High Court of Uganda shall be established to try individuals alleged to have committed serious crimes during the conflict. Paragraph 9 envisages enactment of legislation providing for the law applicable, rules of procedure and recognition of traditional and community justice processes in the proceedings.

Some Ugandans hope that such a court will provide the ICC a graceful mechanism for admitting that while Uganda did not have the capability to try suspected war criminals at the time the indictments were filled, the special division serves this function and now the ICC is no longer necessary. In any case, many seek to convince the ICC that the matter can be handled internally. Civil society groups are skeptical, however, of the special division's ability to provide justice. Even officials of the Ugandan judiciary recognize the significant challenges an internal court would pose. Kampala High Court Registrar Paul Gadenya, who worked for the ICC, said that Uganda "lacks the required laws to set up a special court [to] prosecut[e] [the LRA leader and his indicted colleagues for] war crimes and crimes against humanity." Prosecution would require acts of Parliament and the adoption of war crimes statutes, statutes regarding a special court's functions, offences to be tried and the court's specific jurisdiction. While not dismissing the idea, Gadenya was pessimistic, noting that "It may not be possible for Uganda to immediately set up a local special court to try the LRA top commanders for war atrocities because we lack both the local and international laws governing the offence[s]."

A second possible resolution sought by the LRA is that the government of Uganda request that the Security Council defer proceedings on the warrants for twelve months pursuant to article 16 of the Rome Statute. Indeed LRA representatives said the LRA would only disarm if arrest warrants were deferred — a retreat from an earlier position that group would only disarm if the ICC lifted arrest warrants. This is a telling concession following months of consistent refusals by the prosecutor, and supported nearly unanimously by the international community, to lift the warrants. The Security Council has the power to defer prosecution for up to 12 months under article 16, which provides that:

> No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

The provision has its origins in Article 23(3) of the International Law Commission's (ILC) Draft Statute prohibiting prosecution arising from a "situation" already being dealt with by the Council "as a threat to or breach of the peace or an act of aggression" under Chapter VII of the UN Charter, unless the Council permitted otherwise. This was a highly controversial issue, with supporters emphasizing the need to prevent the Court from potentially interfering with the Council's duty to maintain international peace and security mandated under Article 23(1) of the UN Charter. On the other hand, many delegations opposing the text pointed out that leaving open the possibility for Security Council interference in judicial proceedings contaminated the ICC's independent character. The varying views were consolidated into three categories: the first favored the ILC Draft Statute's approach prohibiting proceedings; the second opposed giving the Council any role at all; and the third, a compromise position eventually adopted as Article 16, allowed investigations or prosecutions unless the Council adopted a resolution under Chapter VII of the UN Charter.

The drafting history of Article 16 is revealing, indicating that many delegations were concerned with maintaining the ICC's independence from Security Council interference. Moreover, even where Article 16 is used as a safety valve to maintain international peace and security, reference to the drafting history indicates that it should only be envoked where prosecution or investigations arise from a situation that the Council is already dealing with under Chapter VII and would, therefore, interfere with Council efforts. Therefore, drafting history suggests that an Article 16 deferral is inappropriate for the Uganda situation because proceedings would not conflict with Security Council initiatives in the area, and because allowing the Ugandan Government to impede prosecution through the Security Council would clearly compromise the Court's impartiality and independence — a move many consider fatal to the Court's integrity and very existence.

Despite continued hopes for an alternative to the ICC, the LRA's delegation in The Hague continues to familiarize itself with the Court. On March 10, 2008, ICC Registry Heads of the Legal Advisory Services Section and the Division of Victims and Counsels met with the delegation to provide an overview of the Court and its organs, as well as the requirements for including counsel on the Court's list of counsel and clarifications on procedures and time limits for filing documentation and materials with the Registry. In addition, the delegation was informed about the ICC's witness protection program. The delegation asked to be furnished with various documents including warrants of arrest, precedents for filing motions before the Court, and the format for power of attorney.

Hybrid and Internationalized Tribunals

The Extraordinary Chambers in the Courts of Cambodia

In 2008 the Extraordinary Chambers in the Courts of Cambodia (ECCC) has slowly continued to take steps towards trying former leaders of the Khmer Rouge. In particular, the ECCC progressed in the pre-trial process of Nuon Chea, one of five accused in ECCC custody. Although the Court remains underfunded, it is making a push to obtain the funding needed to successfully complete the trial process.

In early February Nuon Chea, known as "Brother Number Two" since he served as Pol Pot's second in command, appealed his detention before the Pre-Trial Chamber. Nuon Chea, now 81 years old, has been in ECCC custody since September 19, 2007. He argued that his previous interactions with the Court were illegal because he did not have a lawyer and did not waive his right to counsel. His current lawyer claimed that the investigating judges in the case violated criminal procedure rules by putting undue stress on the accused. On March 20 the Pre-Trial Chamber denied his appeal, concluding the detention was needed to prevent the accused from interfering with witnesses, tampering with evidence, and potentially fleeing the country. Moreover, the Court pointed out that if Nuon Chea were released, his safety could be at risk.

In the process of reaching its decision regarding Nuon Chea's detention, the ECCC achieved a milestone when, for the first time, a victim took the stand to testify against a former Khmer Rouge leader. In charging Nuon Chea with war crimes and crimes against humanity, the Court's investigating judges alleged that he participated in "murder, torture, imprisonment, persecution, extermination, deportation, forcible transfer, enslavement and other inhumane acts." At Nuon Chea's pretrial hearing, Theary Sent, a Cambodian-American human rights advocate, described in court how her parents were killed in the genocide perpetrated by the Khmer Rouge. Nuon Chea disclaimed responsibility and denied that genocide occurred in Cambodia.

The victim participating in Nuon Chea's pretrial hearing also marked the first time that any international or hybrid tribunal investigating war crimes, crimes against humanity, or genocide granted full procedural rights to victims. The ECCC's Internal Rules allow victims to participate in the proceedings as civil parties. Civil parties have rights similar to those of the accused, and are able to participate in the investigation, be represented by counsel, call witnesses to the stand, question the accused, and argue for reparations. The Court appointed four lawyers to represent such victims of the Khmer Rouge.

Along with the Court's success in bringing detainees like Nuon Chea closer to trial, the Court has also run into problems, such as the old age and poor health of the accused. In early February former Khmer Rouge Foreign Minister Ieng Sary was hospitalized several times. Sary also has heart problems and appealed his detention in December 2007 due to poor health. Sary's health problems are illustrative of issues affecting the five detainees in ECCC custody because of old age. If the accused are not brought to trial soon, some fear they may die before they can stand trial.

The Court has also experienced funding problems. A lack of proper funding prompted ECCC officials to formally request additional funds from the United Nations (UN) in March. Officials requested $114 million, which, if donated, would increase the ECCC's current budget of $56.3 million to $170 million. The Court needs additional funding to operate until March 2011, two years beyond the date the ECCC initially projected. The ECCC claims that disagreements with the Cambodian Bar Association regarding membership fees for foreign lawyers, as well as procedural problems and language difficulties, led to delays in reaching the trial stage. Major donors currently include Japan, France, Germany, Britain, and Australia. Despite the ECCC's successes, it will have to work hard to convince other nations to contribute, due to corruption charges in hiring practices last year.

The War Crimes Chamber of the State Court of Bosnia and Herzegovina

The War Crimes Chamber of the State Court of Bosnia and Herzegovina (WCC) has made recent strides in three trials involving indictees accused of genocide. The cases are particularly relevant because the WCC has not convicted anyone of genocide to date, and such a conviction would mark an important achievement. Article 171 of the Criminal Code of Bosnia and Herzegovina defines someone guilty of genocide as:

> Whoever, with an aim to destroy, in whole or in part, a national, ethnical, racial or religious group, orders the perpetration or perpetrates any of the following acts: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of one group to another group.

If convicted of genocide, there is a mandatory minimum ten-year sentence. The three cases involve varying numbers of accused perpetrators carrying out different acts, but all working in conjunction with Serb authorities.

The first case — *Prosecutor v. Mitrović et. al.*, known as the Srebrenica 11 case or the Kravica case — implicates 11 men accused of genocide perpetrated between July 10 and 19, 1995, as part of a widespread and systematic attack on Bosniaks inside Srebrenica, which was a UN-protected area at the time. The attack took place in the villages of Kravica and Sandići and was allegedly part of a larger plan to partially destroy a group of Bosniaks. The accused were involved in different capacities, either as part of the Special Police Second Squad or as part of the Republika Srpska Army (VRS). Alleged perpetrators secured a road between the two villages to forcibly transfer approximately 25,000 women, children, and elderly Bosniaks from Srebrenica. In addition, the accused allegedly detained several thousand Bosniak men and subsequently handed over many to the VRS. The VRS then trans-

ferred the Bosniaks, who have not been heard from since. Finally, the accused allegedly took part in executing a group of over 1,000 Bosniak male prisoners detained at the Kravica Farming Cooperative warehouse.

The trial began in May and recently received new evidence from Richard Butler, a military analyst with the Prosecution at the International Criminal Tribunal for the Former Yugoslavia (ICTY). Butler testified that the Special Police Forces acted under VRS command, and claimed that the VRS attacked Srebrenica in response to attacks led by a division of the Army of Bosnia-Herzegovina. After the attack, the VRS proceeded to implement operations approved by Radovan Karadzić, then president of the Republika Srpska. The original goal of the operation was to ensure that the protected zone covered only Srebrenica and nothing more, but it allegedly led to the crimes for which the indictees stand accused. Butler also said documents he reviewed revealed that Miloš Stupar, one of the accused, commanded the Special Police Second Squad until August 24, 1995. Nine of the other indictees allegedly belonged to this police squad, and the eleventh indictee, Milovan Matić, was a member of the VRS. By providing information regarding the motivation for the VRS's attack, and the leadership of the Special Police Second Squad, Butler added valuable evidence to the record in a key WCC trial.

Another genocide case now being tried is the case of Milorad Trbić. Trbić, former assistant to the Chief of Security of the Zvornik Brigade of the VRS and manager of the Military Police Company of that brigade, is accused of genocide perpetrated from July 11 to November 1, 1995. The accused allegedly oversaw, controlled, and participated in the executions and subsequent burials of Bosniak men in different locations. Trbić is accused of perpetrating the execution of over 7,000 Bosniak men with the help of other VRS soldiers. Furthermore, Trbić allegedly organized, oversaw, and controlled the forced transfer of Bosniak men from Srebrenica.

Tribić's trial began November 8, 2007. Since February, various witnesses have presented eyewitness accounts of the situation in Srebrenica at the time of the atrocities. Mirsada Malagić and protected witness A41, a former member of the Bratunac Brigade Military Police with the VRS, testified about civilian massacres taking place in the days following Srebrenica's fall. Milovan Djokić, a member of the Bratunac Brigade, described how he guarded buses transferring captives from Srebrenica to the town of Pilice. Zoran Radosavljević, a civilian from Pilice, testified that he saw buses outside a school in Pilice where Bosniaks transported from Srebrenica were subsequently executed. Finally, Richard Butler, who also testified in the Srebrenica 11 case, claimed Trbić was the officer in charge of the reburial of bodies in other graves. Butler testified that Trbić's "task was to help . . . perform the tasks related to the execution of prisoners, as well as the burial and transfer to new graves." Butler explained such tasks "could only be performed by someone who had detailed information on what was going on." The testimony of these different witnesses will play an important role in the outcome of Trbić's case.

The third pending genocide case involves Vinko Kondić, suspected of instigating the perpetration of genocide. A member of the Executive Committee of the Serbian Democratic Party (SDS) Municipal Organization in Ključ since June 1991, Kondić allegedly perpetrated crimes against Bosniak and Croatian civilians. The specific crimes include stopping a bus of Croatian refugees, who were subsequently tortured and transferred to a concentration camp, and assisting the round-up of Bosniaks in Ključ and surrounding areas, who also were later transferred to camps or summarily executed. Ironically, before being detained, Kondić served as additional defense counsel for Momčilo Gruban, a Bosnian Serb currently on trial before the WCC for war crimes. Kondić was one of several attorneys approved to serve as Court-appointed lawyers to defend suspected war criminals.

The WCC recently confirmed Kondić's indictment on March 4, 2008. The trial process is still in its early stages, and on March 24 a plea hearing was postponed because Kondić had not yet read the indictment. Kondić claims his failure to read the indictment was due to poor health and subpar conditions at the Correctional Facility in Doboj where he is detained. Although it is early in the process, Kondić's case is worth following because it may yield a genocide conviction.

If the prosecution is successful in any of these three cases, it will be an important step forward for the WCC. Successful genocide convictions serve as a further form of accountability for those found guilty of accompanying crimes. Such convictions might also further reconciliation in Bosnia and help close a terrible period in Bosnia's recent past. ***HRB***

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