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Updates from the International and Internationalized Criminal Courts

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UPDATES FROM INTERNATIONAL AND INTERNATIONALIZED CRIMINAL COURTS & TRIBUNALS

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

On March 17, 2009, the Appeals Chamber sentenced Momčilo Krajišnik, a Bosnian Serb leader, to 20 years imprisonment, upholding earlier guilty verdicts on charges of deportation, forcible transfer, and persecution of non-Serb civilians committed during the conflict in Bosnia and Herzegovina. The Trial Chamber found that Krajišnik participated in a joint criminal enterprise to alter the ethnic composition of the territories under the control of the Bosnian-Serb Republic by drastically reducing the proportion of non-Serbs. However, with respect to the expanded crimes of murder, extermination and persecution (other than those based on deportation and forcible transfer), the Appeals Chamber held that the Trial Chamber failed to identify when those acts became part of the common goal of the joint criminal enterprise and made only scarce findings, if any. It, therefore, quashed Krajišnik's convictions for these expanded crimes.

On February 26, 2009, five senior Yugoslav and Serb officials were convicted of crimes against humanity directed at the ethnic Albanian population in Kosovo, committed in early 1999. Former Yugoslav Deputy Prime Minister, Nikola Šainović, Yugoslav Army General, Nebojša Pavković and Serbian Police General Sreten Lukić were each sentenced to 22 years imprisonment for crimes against humanity and violation of the laws or customs of war. The court held that Šainović, as "one of the closest and most trusted associates of Milošević" was "one of the most crucial members" of the joint criminal enterprise. Yugoslav Army General, Vladimir Lazarević and Chief of the General Staff, Dragoljub Ojdanić were found guilty of aiding and abetting the commission of a number of charges of deportation and forcible transfer of the ethnic Albanian population of Kosovo and were each sentenced to 15 years imprisonment. However, Milan Milutinović, the former President of Serbia, was acquitted of all charges because the Prosecution failed to prove that he had made a significant contribution to the joint criminal enterprise, or that he had actual

control over the actions of the military forces in Kosovo. The presiding judge, Iain Bonomy, recognized that these actions had caused the departure of at least 700,000 Kosovo Albanians from Kosovo between March and June of 1999.

This trial was one of the Tribunal's largest and most complex, with trial proceedings that began on July 10, 2006, and concluded on 27 August 2008. Since its establishment, the Tribunal has indicted 161 persons for serious violations of humanitarian law committed on the territory of the former Yugoslavia between 1991 and 2001 and proceedings against 116 have been concluded.

THE WAR CRIMES CHAMBER OF THE COURT OF BOSNIA AND HERZEGOVINA

The Special Department for War Crimes, in the Court of Bosnia and Herzegovina has issued numerous indictments thus far in 2009. Blagoje Golubović was indicted as a member of the military of the Serb Republic of Bosnia and Herzegovina, subsequently the Republika Srpska, which directed attacks against non-Serb civilians of the Foča Municipality. As a member of the forces, he participated in a plan to accomplish the common goal of executing non-Serbs in the village of Podkolun in the Foča Municipality. He and others, armed with automatic weapons, separated themselves from the group to enter the village where they shot and killed victims. The Court charged him with knowingly and deliberately participating in a joint criminal enterprise and committing crimes against humanity.

Other members of the Republika Srpska indicted earlier this year include Damir Ivanković, Zoran Babić, Gordan Durić, Milorad Radaković, and Dušan Janković. Along with numerous others, these men were indicted on charges of a joint criminal enterprise to persecute and commit crimes against Bosniaks and Croats on political, ethnic, and religious grounds. Their crimes include deliberate deprivation of life, forcible transfer of population, and inhumane treatment. Additionally, Janković was

charged with command responsibility, as a superior who failed to undertake necessary and reasonable measures to prevent the commission of the previously mentioned crimes.

The Appellate Division of the Court of Bosnia and Herzegovina upheld a judgment against Željko Lelek on January 12, 2009. Lelek was sentenced to 16 years of imprisonment for crimes against humanity after the Appellate Division dismissed his appeal as unfounded. He was tried for his role persecuting the Bosniak civilian population in the Višegrad Municipality through severe deprivation of physical liberty, unlawful imprisonment, torture, rape, and other forms of sexual violence. The court upheld the judgment against Lelek finding that the evidence was used in a methodical way and facts were supported by underlying evidence in accordance with the "beyond the reasonable doubt" standard.

Two other accused who appealed their judgments were Mirko Todorović and Miloš Radić. Their sentences to 17 years imprisonment by the Trial Panel, were revised to 13 and 12 years respectively by the Appellate Panel. Both Todorović and Radić helped a group of soldiers by giving information and guidance to find and capture a group of Bosniak civilians, after which the soldiers tortured and murdered them. The Appellate Panel considered extenuating circumstances including that the accused had no convictions since the commission of the offense and that they are married with three children each. Therefore, their sentences as accessories to the commission of the crime of persecution were revised and their sentences reduced. Both men addressed the Appellate Chamber and expressed remorse, claiming to have suffered as silent observers to crimes committed against their respected neighbors.

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

The Prosecutor v. Simon Bikindi, ICTR-01-72

Trial Chamber III of the International Criminal Tribunal for Rwanda issued a

judgment in the case against Simon Bikindi, a Rwandan citizen, on December 2, 2008. The Chamber found Bikindi guilty on only one of six counts charged under Article 2 and 3 of the ICTR Statute, namely, direct and public incitement to commit genocide. The Chamber acquitted Bikindi on charges of conspiracy to commit genocide, complicity in genocide, murder as a crime against humanity, and persecution as a crime against humanity. He was sentenced to fifteen years in prison.

When the genocide began in 1994, Bikindi was a composer, a singer, and an active member of the Ministry of Youth and Association Movements of the government of Rwanda. In particular, he was the director of the Irindiro Ballet, most of whose members ultimately joined the Interahamwe and participated in the genocide. The Prosecution alleged that after President Habyarimana's death in 1994, Bikindi participated in the systematic and violent campaign waged against the Tutsis through his musical compositions and speeches at public gatherings, which incited and promoted hatred. Furthermore, the Prosecution sought to prove that Bikindi collaborated with government figures and leaders of the genocide—the Mouvement Revolutionnaire Nationale pour le Developpement (MRND), the Interahamwe, the Coalition for the Defence of the Republic (CDR), and the Radio Télévision Libre des Mille Collines (RTLM) radio station—to spread anti-Tutsi ideology. Finally, the Prosecution alleged that Bikindi trained the Interahamwe and was personally responsible for specific attacks and killings in Gisenyi because of his direct participation and his command over the Interahamwe members of the Irindiro ballet.

The Defense contended that Bikindi was merely a musician, not a political man, and has no intention or ability—through his own authority or by way of influence—to incite discrimination or violence against Tutsi with his music. In the presentation of its case, the Defense focused primarily on the lack of reliable evidence presented by the Prosecution, arguing that it failed to show authority or influence over any of the main parties involved in planning and executing the genocide.

Following the trial the Chamber concluded that, although the Prosecution had successfully established that Bikindi's musical compositions were colored with

a strong anti-Tutsi message, the Prosecution failed to provide sufficient evidence to show that Bikindi intended to incite participation in the genocide through the playing of his songs on the RTLM radio station. Indeed, testimony indicated that he had no authority over the RTLM's programming. Nevertheless, the Chamber convicted Bikindi on the charge of direct and public incitement to commit genocide on the basis of speeches he made through the public address systems outfitted on several vehicles he used. The evidence presented satisfied the Chamber that Bikindi traveled through Giyseni on the main road in a convoy of Interahamwe, during which time he broadcast his songs and other anti-Tutsi songs over a loud speaker attached to his vehicle and repeatedly insisted that the Hutu majority exterminate all Tutsi.

The Chamber stressed that, in order for hate speech to be considered a crime for the purposes of the ICTR's jurisdiction, the speech must be a public and direct appeal to commit an act of genocide, amounting to more than a vague or indirect suggestion. It further explained that context is the principal consideration when determining whether the hate speech amounts to a crime under the ICTR Statute. Therefore, in making its decision, the Chamber looked to the cultural and linguistic environment in which Bikindi acted, his political and community affiliation, his audience, and how that audience specifically understood his speech. Ultimately, the Chamber found that Bikindi did incite and promote participation in the genocide and that he intended to do so. The final comments made on behalf of this conclusion make manifest the Chamber's conviction in its judgment: Bikindi blatantly and plainly called on "the majority" to "rise up and look everywhere possible," and not to "spare anybody," referring immediately to the Tutsi.

As for the remainder of the charges, the Chamber agreed with the Defense that the Prosecution had presented insufficient or unconvincing evidence on which to base a conviction. In summary, the Chamber decided that the Prosecution did not prove that Bikindi collaborated with those alleged to militarize and indoctrinate the Interahamwe with anti-Tutsi ideology and to disseminate anti-Tutsi ideology and propaganda. Furthermore, the Chamber held that the Prosecution did not prove that Bikindi participated in recruitment

and military training of the Interahamwe. Finally, although the Chamber did find that the Prosecution established that Bikindi was in fact considered to be an important figure and a man of authority amongst the Interahamwe, the evidence was not sufficient to hold him liable for the actions of the Interahamwe under a theory of superior responsibility.

Francois Karera v. the Prosecutor, **Case No. ICTR- 01-74-A**

On February 2, 2009, the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) issued its judgment in the case against Francois Karera. The Trial Chamber of the ICTR convicted Karera, who served as the primary Prefect of Kigali during the 1994 genocide, of genocide and extermination and murder as crimes against humanity, sentencing him to life imprisonment. While the Appeals Chamber accepted three of Karera's twelve grounds for appeal, it affirmed the life sentence.

One of Karera's grounds for appeal included the claim that the Trial Chamber generally applied incorrect standards of law in assessing the accused's own testimony. Pointing to Canadian case law, Karera argued that when the presumption of innocence is at stake, a defendant's testimony must be assessed pursuant to special rules which require judges to evaluate the defendant's credibility, to state whether they believe him, and to explain why they are satisfied beyond a reasonable doubt of his guilt despite contradictory evidence in his testimony. In dismissing this argument, the Appeals Chamber emphasized that the ICTR is not bound by any national rules of evidence or any national case law. In fact, there is no requirement in the Tribunal's jurisprudence that the defendant's credibility be assessed first nor in isolation from the rest of the evidence presented.

Karera also argued that the Trial Chamber, as a general matter, erred by erratically applying the Tribunal's jurisprudence on corroboration. In response, the Appeals Chamber noted that the Trial Chamber has the discretion to decide, depending on the circumstances of each case, whether corroboration of evidence is necessary. Accordingly, it may rely on uncorroborated, but otherwise credible, witness testimony and may also only use part of a witness's testimony in reaching a conclusion if the other parts are insufficient or not

credible. Therefore, just as the Tribunal is not bound by national rules or case law, it is also accorded a relatively substantial level of discretion as to which rules it does apply when assessing the credibility of witnesses and considering testimonies.

Despite the substantial deference given to the Trial Chamber's factual findings, the Appeals Chamber did accept Karera's grounds for appeal regarding his responsibility for the murders of three Tutsis: Joseph Kahabaye, Jean Bosco Ndingutse, and Palatin Nyagatare. The Appeals Chamber held that no reasonable trier of fact could have concluded beyond a reasonable doubt that the three individuals were murdered as a consequence of an order to kill Tutsis given by Karera. Thus, the Appeals Chamber reversed the convictions for ordering genocide and extermination and murder as crimes against humanity as far as they related to these three individuals. The Appeals Chamber reversed Karera's conviction for instigating murder as a crime against humanity to the extent that the conviction was based on the killing of someone referred to as Gakuru on a similar basis. The remaining ground of appeal found to be successful by the Appeals Chamber related to a defect in the Prosecution's amended indictment that was not adequately cured. Ultimately, however, the Appeals Chamber affirmed the Trial Chamber's convictions for genocide and the crimes against humanity of murder and extermination, based on findings unrelated to those that the Appeals Chamber found to be in error.

The Appeals Chamber rejected Karera's contention that the Trial Chamber erred in imposing the sentence of life imprisonment. Karera specifically argued that the Trial Chamber disregarded important mitigating factors, including the fact that he had participated in so-called "pacification meetings," engaged in efforts to ensure the safety of a well-known Rwandan Patriotic Front supporter, and that he was involved in community development before the start of the genocide. The Appeals Chamber rejected this ground of appeal, stating that Karera merely pointed out facts that would have been mitigating, but he did not sufficiently establish that the Trial Chamber undervalued those factors. In affirming the Trial Chamber's use of these factors, as well as its use of the aggravating circumstances, the Appeals Chamber highlighted

once again the level of discretion given to the Trial Chamber.

Prosecutor v. Bagosora, et al. Case No. Case No. ICTR-98-41-T

On December 18, 2008, after 409 days of trial, the International Criminal Tribunal for Rwanda delivered its judgment in the case of *Prosecutor v. Bagosora, et al.*, commonly referred to as the "Military I Trial." The Tribunal convicted three of the four accused for crimes committed in Rwanda in 1994. These three, Colonel Théoneste Bagosora (*Directeur de Cabinet* of the Ministry of Defence), Major Aloys Ntabakuze (commander of the elite Para Commando Battalion), and Colonel Anatole Nsengiyumva (commander of the Gisenyi operational sector), were found to have committed several counts of genocide, crimes against humanity (murder, extermination, rape, persecution and other inhumane acts) and war crimes (violence to life and outrages upon personal dignity). Given their convictions for the genocide, however, the Tribunal acquitted each on charges of conspiracy to commit genocide and the Prosecution agreed to dismiss charges against the three for complicity in genocide. Bagosora, Ntabakuze, and Nsengiyumva were each sentenced to life in prison. The Tribunal acquitted the fourth defendant, General Gratien Kabiligi, the head of the operations bureau (G-3) of the army general staff, on all counts.

The Prosecution alleged that the four accused had conspired amongst themselves and with others from late 1990 through April 1994 to exterminate the Tutsi population. In response, the Defense disputed the credibility of the Prosecution's evidence, claiming that the Prosecution had drawn inferences from unproven facts. In addition, the Defense offered alternative explanations for the events which occurred after President Juvénal Habyarimana's plane was shot down on April 6, 1994. While the Trial Chamber noted that conspiracy to commit genocide could be established by way of circumstantial evidence, it also explained that it could only convict where conspiracy is beyond a reasonable doubt the only reasonable inference to be drawn from the evidence presented.

In this case, the Chamber found that the Prosecution had failed to meet its burden. First, the Chamber found that the participa-

tion by Bagosora, Ntabakuze and Nsengiyumva on a 1991 commission established to identify "the enemy"—determined to be primarily Tutsi—and that where these findings were circulated to soldiers in the Rwandan Army by Ntabakuze in 1992 and 1993. Furthermore, the Chamber found that Bagosora, Ntabakuze and Nsengiyumva played a role in the creation, arming, and training of the *Interahamwe* militia and the maintenance of lists of suspected accomplices of the Tutsi-dominated Rwandan Patriotic Front.

Despite these findings, the Chamber held that, while the evidence could be construed to support a conspiracy to commit genocide, the evidence could also prove plans for a political or military power struggle. Notwithstanding its finding against the conspiracy charges, the Trial Chamber expressly noted that it answered the question of "whether the Prosecution ha[d] proven beyond reasonable doubt based on the evidence in this case that the four Accused committed the crime of conspiracy," and "not whether there was a plan or conspiracy to commit genocide in Rwanda." The Chamber further emphasized that the Defense's "alternative explanations" about the evidence set forth on the conspiracy charge did *not* "raise doubt about whether a genocide occurred in Rwanda."

Regarding the convictions, the Chamber found Bagosora and Nsengiyumva guilty of genocide, crimes against humanity, and war crimes on the basis of conduct for which they were directly responsible under Article 6(1) of the ICTR Statute and for the conduct of subordinates based on the theory of superior responsibility under Article 6(3) of the Statute. Notably, the Chamber found that Bagosora was the highest authority in the Ministry of Defense and exercised effective control over the Rwandan army and gendarmerie and that Nsengiyumva held the highest level of operations authority in Gisenyi prefecture. The Chamber convicted Ntabakuze of these crimes solely on the basis of superior responsibility. Although Kabiligi was charged with these crimes, the Chamber found that he raised an alibi on those counts for which he was charged with direct responsibility and that the Prosecution failed to prove that Kabiligi exercised any *de jure* or *de facto* command authority.

SPECIAL COURT FOR SIERRA LEONE

Prosecutor v. Sesay, Kallon, & Gbao, Case No. SCSL-04-15-T

On February 25, 2009, the Trial Chamber of the Special Court for Sierra Leone (SCSL) convicted former leaders of the Revolutionary United Front (RUF) Issa Hassan Sesay for 16 counts, Morris Kallon for 16 counts, and Augustine Gbao for 14 counts of crimes against humanity, war crimes, and other serious violations of international humanitarian law. These counts included: extermination, rape, sexual slavery, and other inhumane acts (forced marriage) as crimes against humanity; the war crimes of physical violence, enslavement, terrorism, collective punishment, outrages upon personal dignity, unlawful killing of civilians, cruel treatment, and pillaging; and conscription of children into armed forces and intentional attacks against humanitarian personnel as other serious violations of international humanitarian law. Each accused was acquitted on the charges of murder as a crime against humanity and the war crime of hostage taking, and Gbao was found not guilty on the charges relating to child soldiers and physical violence. Sesay was sentenced to fifty-two years imprisonment, Kallon to thirty-nine years, and Gbao to twenty-six years.

Initially, the RUF trial involved five accused: Issa Hassan Sesay, the Interim Leader of the RUF; Morris Kallon, temporary commander of the RUF; Augustine Gbao, senior officer and RUF ideology instructor; Foday Sankoh, one of the founders of the RUF; and Sam Bockarie, leading member and temporary commander of the RUF. However, indictments against Sankoh and Bockarie were withdrawn due to their deaths.

One notable aspect of the judgment is that it marks the first time that an international criminal body has convicted an accused for acts constituting forced marriage. While the SCSL Appeals Chamber had recognized, in the case against the Armed Forces Revolutionary Council (AFRC), that forced marriage could constitute “other inhumane acts” as a crime against humanity under the SCSL Statute, separate and distinct from rape or sexual slavery as crimes against humanity, the Appeals Chamber did not enter convictions against the AFRC accused for acts of

forced marriage. In the RUF judgment, the Trial Chamber further expands on the components of forced marriage as the crime against humanity of other inhumane acts, saying that it is based on the “accused’s responsibility for women and girls being forced into ‘marriages’ and being forced to perform a number of conjugal duties under coercion by their ‘husbands.’” The Chamber distinguishes the crime against humanity of rape from that of other inhumane acts (forced marriage) on the grounds that “the offence of rape requires sexual penetration, whereas ‘forced marriage’ requires a forced conjugal association based on exclusivity between the perpetrator and victim.” It also distinguishes sexual slavery from forced marriage, saying the “distinct elements are a forced conjugal association based on exclusivity between the perpetrator and victim.”

Another interesting feature of the RUF judgment is found in the disagreement between the majority of the Trial Chamber and Justice Pierre Boutet regarding Gbao’s criminal responsibility for several of the alleged crimes. The majority found that Gbao, like Sesay and Kallon, was responsible for a number of crimes due to his participation in a joint criminal enterprise (JCE) that existed between senior leaders of the RUF, AFRC, and Liberian President Charles Taylor between May 1997, when a joint RUF-AFRC junta overthrew the democratically elected government in Freetown, through April 1998. The purpose of the JCE, according to the majority, was to take any action necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. While Justice Boutet agreed as to the existence of the RUF-AFRC joint criminal enterprise, he disagreed that Gbao played a sufficiently significant role in the enterprise to be held liable on a theory of JCE liability. The majority based its findings regarding Gbao’s participation in the JCE primarily on the fact that Gbao was the “RUF ideology instructor” and that “ideology played a significant role in the RUF movement as it ensured not only the fighters’ submission and compliance with the orders and instructions of the RUF leadership[,] but also hardened their determination, their resolve and their commitment to fight to ensure the success and achievement of the ideology of the movement.” By contrast, Justice Boutet held that, in a “broadly

pleaded joint criminal enterprise” such as that alleged by the Prosecution against the RUF, it is necessary to “require a close connection between the goals of the [JCE] and the contribution of each of the Accused.” In Gbao’s case, there was no such close connection, according to Justice Boutet.

Finally, Justice Bankole Thompson wrote a separate concurring opinion addressing, *inter alia*, whether the accused could have successfully argued that their actions were justified by the doctrine of just war. Notably, the legitimacy of entering into armed conflict (*jus ad bellum*) is not within the subject matter jurisdiction of the Special Court, none of the accused affirmatively raised such a defense, and no international criminal body has ever held that fighting a “just war” is a valid defense against war crimes or crimes against humanity. Nevertheless, Justice Thompson examined the potential defense and found it lacking. First, Justice Thompson explained that the doctrine of just war is rooted in the “right to rebel against a corrupt and oppressive civilian government.” Then, he concluded that because the ideology of the RUF postulated that their actions stemmed from the will of the people and was an armed liberation campaign against a corrupt government, the RUF’s defense of just war failed because, among other reasons, there was no evidence presented to demonstrate that the RUF exhausted all other non-violent alternatives, or that the government did any wrongs to justify rebellion.

THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

The First Trial Gets Underway in the ECCC

On March 30, 2009, the Extraordinary Chambers in the Courts of Cambodia (ECCC) began proceedings in the trial of Kaing Guek Eav, a.k.a. Duch, a prominent figure in the Khmer Rouge regime. The trial is expected to continue through early July. Duch is being charged with crimes against humanity, war crimes, and murder and torture under domestic law based on his role as the head of S-21, the interrogation and torture center of the Khmer Rouge regime, also called Tuol Sleng. On the first day of proceedings, Duch sought forgiveness in court and apologized for the atrocities with which he is charged, saying: “My current plea is that I would like you

to please leave an open window for me to seek forgiveness.”

The first witnesses to testify in the trial have been former prisoners of M-13, a jungle prison that was the predecessor of S-21, in order to provide insight into Duch’s character and background on the establishment and general operating procedures of S-21. The first such witness was Francois Bizot, who described Duch as a man “who was a vector of state-institutionalized massive killing on the one hand, and on the other hand, a young man who had committed his life to a cause, to a purpose, based on the idea that crime was not only legitimate, it was deserved.” Bizot testified that it was Duch’s “duty to be the interrogator,” that his “job was to write up reports on the people sent to him for execution purposes.” Yet the witness also said that, although he was interrogated daily, he was never beaten and Duch always questioned him “in a polite way.”

The first weeks of the trial proceeded relatively smoothly. However, the Trial Chamber faces challenges regarding the extent of civil party participation, including the processing of some 161 civil party applications received in February, accurate and timely translations, and protection measures for witnesses.

Ongoing Challenges at the ECCC

The ECCC continues to struggle with whether to charge other key members of the Khmer Rouge, a possibility that Prime Minister Hun Sen staunchly opposes on the grounds such a decision would cause social strife. The issue is currently pending before the Pre-Trial Chamber, which has jurisdiction to resolve disputes between the Co-Prosecutors of the ECCC. Presently, the international Co-Prosecutor supports going forward with further investigations, while the Cambodian Co-Prosecutor is on record against expanding the number of accused. One factor that may be relevant to the Pre-Trial Chamber’s decision is the fact that the remaining four accused in the dock are so sick that there is speculation they may not make it to trial.

Corruption remains a nagging concern for the tribunal. The United Nations Development Program (UNDP) will not remit frozen funds until an effective ethics monitoring system has been created to process allegations of corruption. Despite efforts

to establish such a system between the UN and the Cambodian side of the tribunal, no agreement has yet been reached. The Japanese bailed out the Cambodian side of the Chambers with an emergency contribution to pay national salaries for the month of March, which the ECCC had previously said were not forthcoming due to insolvency. But, there is obvious concern that the tribunal cannot rely on last minute infusions to float the tribunal through the trials of the five defendants now in custody. An attempt by the UN in early April to broker a deal with the Cambodian government regarding how to address the corruption charges was unsuccessful.

With Justice Comes Closure?

In addition to Duch, four more of the most influential Khmer Rouge leaders sit in custody to be tried for their involvement in the state sanctioned reign of terror unleashed on the Cambodian people from 1975 to 1979. The regime is responsible for some 1.7 million deaths of people who died of starvation, disease, forced labor, torture, and execution. Although the ECCC charges and is prosecuting each defendant for their individual actions under the regime, there is a sense that by bringing these five senior leaders to justice, by holding them accountable for their actions, a nation will be vindicated. Could this court bring salvation for a nation grappling with the legacy of the Khmer Rouge?

At the least, the ECCC provides justice to the actual victims of the accused and symbolic justice to the people of Cambodia en masse and affords a long awaited opportunity for closure. Duch’s trial represents an end to impunity. As former S-21 prisoner, Bu Meng, states, “My feeling is very angry and very happy, mixed. I am angry that Duch killed my wife. And I am very happy because the court is trying the Khmer Rouge leaders. Duch’s trial is very valuable for humanity around the world, and for Cambodians, and for me.” Perhaps the most fundamental consequence of the tribunal is a burgeoning movement to create a comprehensive outreach program aimed at educating and promoting discourse amongst a scarred nation—a nation failed by their government. Cambodians have come together through faith in justice to rally behind a cause of social betterment in their effort to facilitate understanding, reconciliation, and a new beginning.

INTERNATIONAL CRIMINAL COURT

Arrest Warrant Issued for Sudanese President Omar Hassan al-Bashir

On March 4, 2009, Pre-Trial Chamber I of the International Criminal Court (ICC) issued a warrant for the arrest of Omar Hassan Ahmad al-Bashir, President of Sudan, based on a finding that there are reasonable grounds to believe that the president is responsible for two counts of war crimes and five counts of crimes against humanity. This is the first warrant of arrest issued for a sitting Head of State by the ICC. The majority of the Chamber declined to include charges of genocide in the arrest warrant, based on a finding that the material provided by the Prosecution in support of its application for a warrant failed to provide reasonable grounds to believe that al-Bashir acted with specific intent to destroy, in whole or in part, the Fur, Masalit and Zaghawa groups. Judge Anita Ušacka dissented on the issue of genocide. The Prosecution has filed a motion with the Pre-Trial Chamber for leave to appeal the majority’s decision, arguing, *inter alia*, the Chamber applied the wrong standard in evaluating the Prosecution’s evidence in support of the genocide charges. The Chamber’s decision whether to permit the appeal, which falls within the discretion of the Pre-Trial Chamber, remains pending at the time of this writing.

Sudan is not a party to the Rome Statute governing the ICC, but the Security Council vested the Court with jurisdiction to investigate and prosecute crimes committed in the Darfur region of Sudan via a Chapter VII resolution passed in March 2005. Since the beginning of the Court’s work in Darfur, the Sudanese government has refused cooperation with the ICC, including by refusing to enforce two arrest warrants issued by the Court in July 2008 against a high-ranking minister of the Sudanese government and the alleged leader of the Janjaweed militia. President al-Bashir has similarly disregarded his own arrest warrant, travelling internationally several times since the warrant was issued, although only to states that are not party to the Rome Statute. Although there is an argument that even non-ICC parties have an obligation to arrest al-Bashir under the terms of the Security Council’s referral of the Darfur situation to the ICC, it is not expected that the Sudanese

president will be apprehended any time soon. Finally, while the Sudanese government, supported by the African Union, China, and Russia, has requested that the UN Security Council exercise its authority under the Rome Statute to request that the ICC defer proceedings against al-Bashir, veto-wielding Security Council members the United States and the United Kingdom have repeatedly expressed their opposition to such a move.

Amendment of the Charges against Jean-Pierre Bemba Gombo

On 30 March 2009, the Office of the Prosecutor issued an amended document containing the charges in the case against Jean-Pierre Bemba Gombo, the only person charged by the ICC to date in connection with the situation in the Central African Republic. Initially, the Prosecution had charged Bemba with responsibility for three charges of crimes against humanity and five charges of war crimes under Article 25(3)(a) of the Rome Statute, which provides that a person will be criminally responsible for a crime if the person “[c]ommits such a crime, whether as an

individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.” Following the confirmation of charges hearing in January 2009, however, the Pre-Trial Chamber issued a decision adjourning the *Bemba* case and requesting that the Prosecutor consider amending the charges to include allegations that Bemba bears responsibility for war crimes and crimes against humanity under a theory of command or superior responsibility pursuant to Article 28 of the Rome Statute. The Prosecution accepted this proposed change in its amended document containing the charges, which alleges that Bemba bears responsibility under either Article 25(3)(a) or Article 28. The Defense and participating victims will have an opportunity to respond to the revised charges before the Pre-Trial Chamber renders a decision on whether there are substantial grounds to confirm the charges against Bemba. **HRB**

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