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## Updates from the International and Internationalized Criminal Courts

Shaleen Brunsdale

*American University Washington College of Law*

Rita Espinoza

*American University Washington College of Law*

Sarah Venti

*American University Washington College of Law*

Katherine Anne Cleary

*American University Washington College of Law*

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## UPDATES FROM INTERNATIONAL AND INTERNATIONALIZED CRIMINAL COURTS & TRIBUNALS

### INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA AND THE BOSNIAN WAR CRIMES CHAMBERS

#### The Arrest of Radovan Karadžić

Former Bosnian Serb leader, Radovan Karadžić, was arrested on July 21, 2008 by Serbian officials. Karadžić was indicted for a host of human rights violations including genocide, extermination, and inhumane acts. He is charged with the killing of thousands of Bosnian Muslims and Croats during the Bosnian war and for the Srebrenica massacre, in which approximately 8,000 Muslim men and boys were killed.

Karadžić was on the run for nearly thirteen years, eluding UN and NATO efforts to capture him. His arrest by Serbian security officials brought a sense of relief to victims and their families as well as to Serbian officials who were under increasing pressure to arrest Karadžić. But, there still remain many Serbian nationalists who are strong supporters of Karadžić and who held demonstrations to protest his arrest.

Karadžić was admitted to the UN detention unit in The Hague on July 30, 2008, and his initial appearance before the court on July 31 was no doubt the start of what will be a long legal battle. Karadžić declined to enter a plea and in accordance with the rules, after 30 days the court entered a plea of not guilty on his behalf. On September 22, a motion to amend the first amended indictment was entered by the office of the prosecutor (the initial indictments were issued in 1995 and amended in 2000). This motion restructured the charges, and prosecutors hoped the streamlined indictment would help speed up the trial by contributing to an efficient and expeditious presentation of the prosecution's case. Experts and those working in the field criticized the tribunal as ineffective and inefficient after the trial of the former Yugoslav president Milošević was drawn out for four years. Milošević eventually died in his cell before a verdict was reached. Karadžić's indictment was amended to be leaner in hopes of avoiding the strategic mistakes of the Milošević trial.

The proposed amended indictment contains several counts of genocide, persecution, murder, deportation, terror, and taking of hostages. Karadžić waived his right to duty counsel and decided to represent himself, stating that the Tribunal is not a legitimate court, but rather represents a "bastardized judicial system" which was "created to blame the Serbs."

Meanwhile, Karadžić's military commander, Ratko Mladić, is still on the run. Mladić was also jointly indicted more than a decade ago for genocide, complicity in genocide, crimes against humanity, and violations of the laws or customs of war. The arrest of Karadžić led to renewed speculation that Mladić, the commander of the Bosnian Serb Forces, was also within reach. The tribunal's prosecutors have been convinced for years that Mladić was in hiding in Serbia, although there is currently no confirmation of this belief. Serbia's current request to join the European Union hinges on Mladić's arrest. Arresting Mladić may prove more difficult than capturing Karadžić as Mladić is more secretive and reclusive, and is reportedly guarded by a host of loyal, and possibly well-armed, soldiers.

Karadžić's trial may be a great milestone for justice, but it will not be enough to solve Bosnia's complex human rights problems. The bloody war directed by Karadžić and General Mladić left many victims in its wake. Over a decade later, there are still more than 130,000 displaced Bosnians who are unable to return home. There is still a great need for housing, social services and economic opportunities, and the fear of violence and Islamic terrorism is still prevalent. Despite the obstacles that remain, Karadžić's trial in The Hague is a chance for Bosnia to come to terms with its past. Since its conception in 1993 the Tribunal has indicted 161 people and convicted 56 people in connection with the Balkan wars, and has made considerable progress toward justice for a region plagued by some of the worst violence in Europe since World War II.

#### Sentencing of Rasim Delić

On September 15, 2008, Rasim Delić, the Commander of the Main Staff of the Army of Bosnia-Herzegovina (ABiH), was sentenced to three years imprisonment. Delić is one of the most senior military commanders — as well as one of only a few Bosnian Muslims — to be tried before the Tribunal on charges of superior criminal responsibility for the crimes of murder and cruel treatment.

Delić was indicted in March 2005, and his indictment was amended in June 2006. His alleged crimes included failing to take reasonable measures to punish the perpetrators of executions of captured Bosnian Croats and surrendered HVO soldiers in the Travnik municipality in central Bosnia and Herzegovina; failing to take necessary steps to prevent torture, beating, murder, and decapitation committed by his subordinates in a detention facility for captured Bosnian Serb Army soldiers; and failing to prevent the rape of three women by his subordinates in the Kamenica Camp in central Bosnia and Herzegovina.

Delić pled not guilty to all charges. The trial, which commenced in July 2007, lasted for 114 days. Delić was found guilty, by majority, of failing to take the necessary and reasonable measures to prevent and punish the crimes of cruel treatment committed by the El Mujahed Detachment (EMD) of ABiH. The EMD came into existence as a unit of the Army of the Republic of Bosnia and Herzegovina by virtue of an order signed by Delić.

Delić was acquitted of three other counts of murder and cruel treatment. In those cases the Trial Chamber found that no superior-subordinate relationship had existed between Delić and the perpetrators at that time, and the Chamber could not conclude beyond reasonable doubt that Delić had reason to know these crimes were about to be or were committed. These alternate rulings point to the nuanced understanding of human rights violations, since Delić neither witnessed the aforementioned crimes nor did he order his soldiers to commit them. Rather, he failed

to control, monitor, and discipline his subordinates who committed the crimes.

Bosnian Serb and Bosnian Croat officials and war victims groups felt the sentence might have been too lenient. Bosnian Serb Prime Minister, Milorad Dodik, said the sentence showed that “justice for the Serb victims of the war is really unreachable.” These trials are politically charged, largely because the few Bosnian Muslims tried by the ICTY have so far been acquitted or received relatively lenient sentences.

### Sentence Enforcements

On September 15, 2008, Albania became the seventeenth state to sign the agreement on enforcement of sentences with the ICTY, allowing persons convicted before the Tribunal to serve their sentences in its prisons. Poland also recently signed the agreement, joining Italy, Finland, Norway, Sweden, Austria, France, Spain, Germany, Denmark, the United Kingdom, Belgium, Ukraine, Portugal, Estonia, and Slovakia — adding to the growing list of countries that recognize the ICTY as a sanctioned authority of human rights, justice, and international law.

To date, 53 persons convicted by the Tribunal have either served or are currently serving their sentences. Three convicted persons are awaiting transfers to one of the states to serve their sentence. There are a number of cases still pending before the Tribunal, many of which are expected to return sentencing judgments. The enforcement agreement is an important and practical step towards providing a successor nation the authority to supervise the imprisonment of those convicted even after the end of the mandate of the Tribunal.

### Other Updates

Ljubiša Petković has been found guilty of contempt of the Tribunal and was sentenced to four months imprisonment. Petković refused to comply with a confidential subpoena ordering him to appear as a Chamber witness in the case of Vojislav Šešelj on May 13, 2008. Šešelj, the President of the Serbian Radical Party (SRP), is currently being tried for crimes against humanity and violations of the laws or customs of war.

In August 2008, the Trial Chamber issued an indictment against Florence Hartmann, a former spokeswoman for the Tribunal’s Chief Prosecutor, on two counts of contempt of the Tribunal. Hartmann is alleged to have authored a book called “Paix and Chatiment” (Peace and Punishment), published in 2007, and an article published on the website of the Bosnian Institute in 2008, both of which disclosed information related to confidential decisions of the Tribunal’s Appeals Chamber in the case of Slobodan Milošević. The Order states, “Florence Hartmann knew that the information was confidential at the time disclosure was made, that the decisions from which the information was drawn were ordered to be filed confidentially, and that by her disclosure she was revealing confidential information to the public.” Hartmann has rejected the charges and maintained that she was acting in the public’s best interest.

Milan Milutinović was granted temporary provisional release to return to Serbia to undergo a medical procedure from September 10 to October 2, 2008. Milutinović, the President of Serbia from 1997 to 2002, is currently on trial together with five co-accused: Nebojša Pavković, Nikola Šainović, Dragoljub Ojdanić, Vladimir Lazarević and Sreten Lukić, for an alleged campaign of terror and violence directed at Kosovo Albanians and other non-Serbs living in Kosovo in 1999. All have been charged with deportation, forcible transfer, murder and the persecution of thousands of Kosovo Albanians and other non-Serbs. Milutinović’s temporary release is subject to a number of strict conditions, including 24-hour surveillance of the accused by Serbian authorities.

### INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

#### *Prosecutor v. Nahimana, et al., Appeals Judgment, ICTR-99-52-A*

The Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) issued its judgment in the *Nahimana, et al.* case, better known as the “Media Case,” on November 28, 2007. Just over four years earlier, the ICTR Trial Chamber had convicted the three accused — Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze — for genocide, conspiracy to commit genocide, direct and public incitement to

commit genocide, and the crime against humanity of persecution and extermination. Nahimana and Barayagwiza were found guilty based on their roles as members of the “Comité d’Initiative” that founded Radio Télévision Libre des Mille Collines (“RTLM”), a radio station that broadcast virulent messages directed at Tutsis and moderate Hutus between July 1993 and July 1994. Ngeze, on the other hand, was convicted based on acts committed as the founder, owner, and editor of *Kangura*, a newspaper published from 1990 to 1995 that carried hate-filled messages similar to those broadcast on RTLM.

Each of the defendants appealed to the Appeals Chamber, raising a number of issues. One of the more interesting arguments against the Trial Chamber judgment relied on the fact that, although the jurisdiction of the ICTR is limited to crimes occurring in 1994, the Trial Chamber based its convictions for the crime of direct and public incitement to genocide, in part, on acts committed prior to 1994. The Trial Chamber had supported its finding by defining the relevant crime as “an inchoate offense that continues in time until the completion of the acts contemplated.” The Appellants argued that the Trial Chamber confused the terms “inchoate” and “continuing” in its interpretation, and the Appeals Chamber agreed. An inchoate offense, according to the Appeals Chamber, only requires the commission of certain acts capable of constituting a step in the commission of another crime, regardless of whether those acts actually resulted in the later crime. A continuing crime, on the other hand, implies an ongoing criminal activity that either involves ongoing elements or continues over an extended period. Thus, although the Appeals Chamber agreed that direct and public incitement to genocide is an inchoate offense, it held that the Trial Chamber erred in considering that incitement to commit genocide continues in time “until the completion of the acts contemplated.” Nevertheless, based on acts that occurred in 1994, the Appeals Chamber found sufficient evidence to affirm the convictions of Nahimana and Ngeze for the crime of incitement to commit genocide.

Another of the many grounds raised on appeal was whether hate speech could amount to the crime against humanity of persecution. Relying on customary international law prohibiting speech expressing ethnic hatred as discrimination, the Trial

Chamber held that such speech constitutes persecution where it reaches a particular level of gravity, regardless of whether the speech contained a call to action. The Appellants argued that, regardless of whether hate speech was criminalized in domestic jurisdiction, it is not a crime under customary international law and does not fit within the definition of the crime against humanity of persecution because it does not lead to discrimination in fact and is not as serious as other crimes against humanity. The Appeals Chamber rejected those arguments, holding that the crime for which the accused were convicted was the crime against humanity of persecution, not the underlying acts that constituted the persecution. Thus, it did not matter whether hate speech was itself an international crime. On the issue of the gravity of the crime, the Appeals Chamber reasoned that not every individual act underlying the crime of persecution must be of the same gravity as other crimes against humanity. Instead, it explained, all of the underlying acts of the persecution should be considered together, taking into account the cumulative effect of all of those acts and the context in which they took place in assessing their gravity.

The Appeals Chamber also reversed many convictions based on Article 6(1) of the ICTR Statute — which states that a “person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime [within the jurisdiction of the Tribunal] shall be individually responsible for the crime” — holding that it is inappropriate to convict an accused for a specific count under both Article 6(1) and Article 6(3), which states that a superior may be held criminally responsible for the acts of a subordinate “if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.” Hence, in those instances where the accused were convicted under both Article 6(1) and Article 6(3), only the convictions under the latter article were upheld on appeal.

On the basis of the Appeals Judgment, the life sentences given to Nahimana and Ngeze by the Trial Chamber were reduced to 30 years imprisonment, whereas Barayagwiza’s sentence was changed from 35 years in prison to 32 years.

## SPECIAL COURT FOR SIERRA LEONE

### *The Prosecutor v. Moinina Fofana and Allieu Kondewa, Judgment, SCSL-04-14-A*

On May 28, 2006, The Special Court for Sierra Leone (SCSL) Appeals Chamber issued its judgment in the consolidated case against Moinina Fofana and Allieu Kondewa, increasing Fofana and Kondewa’s sentences of six and eight years, to 15 and 20 years, respectively. Fofana and Kondewa were both leading members in the Civil Defense Forces (CDF), Fofana acting as the National Coordinator and Director of War, and Kondewa having been the High Priest of the CDF. In its efforts to support the presidency of Ahmed Tejan Kabbah, the CDF was responsible for a number of the atrocities that occurred during the civil war in Sierra Leone between 1996 and 2002.

On August 2, 2007, the majority of the Trial Chamber convicted both Fofana and Kondewa of the war crimes of violence to life, health and physical or mental well-being of persons, specifically murder and cruel treatment, as well as pillage and collective punishment. The majority also found Kondewa guilty of enlisting children under the age of 15 into armed groups, while Fofana was found not guilty of this same charge. In addition, both Fofana and Kondewa were acquitted of terrorism as a war crime and the crimes against humanity of murder and other inhumane acts.

Both the Prosecution and Kondewa appealed the Trial Chamber’s judgment on a number of grounds. There was no appeal by Fofana. The Appeals Chamber granted four of Kondewa’s six grounds of appeal, reversing the convictions relating to murder in the Town of Talia, pillage, enlisting child soldiers, and collective punishments. The Appeals Chamber granted three of the Prosecution’s ten grounds of appeal, however, extending both Kondewa’s and Fofana’s prison sentences.

The first of the Prosecution’s successful grounds of appeal was that the Trial Chamber erred in acquitting the accused of crimes against humanity on the ground that the general requirements of the crime had not been satisfied. Specifically, the Trial Chamber found that the evidence adduced at trial failed to establish that the acts of the accused — namely, murder and other inhumane acts — were committed as part

of an attack directed primarily at a civilian population. Rather, the Trial Chamber concluded that the attacks were directed against the rebels or juntas that controlled the towns where the attacks took place. The Appeals Chamber disagreed with this, holding that the Trial Chamber “misdirected itself” by confusing the *target* of the attack with the *purpose* of the attack. Based on the factual findings of the Trial Chamber, in particular that the relevant attack was directed at punishing civilians who were collaborating with the rebels, the Appeals Chamber reversed the lower court’s acquittals on two counts of crimes against humanity and entered convictions against both Kondewa and Fofana for murder and inhumane acts as crimes against humanity.

The Appeals Chamber also agreed with the Prosecution’s contention that the Trial Chamber erred in refusing to admit evidence of sexual violence against the accused to support the charges of inhumane acts as a crime against humanity and violence to life, health and physical or mental well-being as a war crime. The Trial Chamber had reasoned that admitting the evidence would prejudice the rights of the accused because the indictment contained no specific factual allegations concerning sexual violence, meaning that admission of the evidence would be inconsistent with the accused’s right to be informed promptly of the charges against him. While the Appeals Chamber agreed that the original indictment was defective with respect to allegations relating to sexual violence, it also found that the Prosecution “cured” this defect by providing the accused with timely, clear, and consistent information regarding the additional allegations and that therefore the evidence should have been admitted. Ultimately, this finding had no effect on the convictions of the accused for inhumane acts as a crime against humanity and violence to life, health, and physical or mental well-being as a war crime, but the Appeals Chamber concluded that the discussion of the Trial Chamber’s error served as “guidance” to the Trial Chamber.

Finally, the majority of the Appeals Chamber accepted the Prosecution’s argument that the Trial Chamber erred in sentencing the two accused because it considered, as a mitigating factor, that the CDF was fighting to support a “just cause.” As an initial matter, the Appeals Chamber noted that a convicted person’s motives

may be considered for purposes of sentencing, citing to the fact that other international criminal tribunals have used motives such as group hatred or bias as aggravating factors. Nevertheless, the Chamber held that the particular motive of “just cause” cannot be considered a mitigating factor because international humanitarian law specifically removes a party’s political motive and the “justness” of its cause from consideration. Furthermore, the Appeals Chamber explained that any motive considered as a mitigating factor must be consistent with the purposes of sentencing, which include: deterrence, retribution, public reprobation, and rehabilitation. In the view of the Appeals Chamber, reducing a convicted person’s sentence based on his political motives, even where considered meritorious, would undermine these purposes.

Justice George Gelaga King issued a dissenting opinion in which he explained that he would not have convicted Kondewa on any of the eight original counts charged by the Prosecution, and that he would have let the Trial Chamber’s judgment against Fofana stand, as the latter did not enter an appeal. Judge King also disagreed with the Appeals Chamber’s findings with regard to sentencing, arguing generally that the majority of the Chamber interfered unjustifiably with the Trial Chamber’s unfettered discretion in matters of sentencing. More specifically, Judge King argued that the Trial Chamber correctly considered the motivations of the accused as a mitigating factor, but did not, as the Appeals Chamber found, apply an inappropriate “just cause” analysis.

### INTERNATIONAL CRIMINAL COURT

#### Cases in the Situation in the Democratic Republic of the Congo (DRC)

##### *The Prosecutor v. Thomas Lubanga Dyilo*

As of this writing, the case against Thomas Lubanga Dyilo continues to be stayed and the accused remains in the custody of the ICC. Lubanga’s trial was scheduled to begin on June 23, 2008, but on June 13, Trial Chamber I stayed the proceedings due to the fact that the Prosecution was unable to release potentially exculpatory materials that had been obtained on the condition of confidentiality. Shortly thereafter, the Chamber held that, in light of the stay of proceedings, the Court could not justifiably continue

to provisionally detain the accused, and therefore ordered the release of Lubanga. At the same time, however, the Chamber agreed to suspend its order pending the Prosecution’s appeal of the June 13 decision staying the proceedings.

Throughout June and July, the Prosecution continued to take measures aimed at lifting the confidentiality restrictions imposed on the relevant exculpatory material, the majority of which had been obtained from the United Nations. While certain concessions were made by the UN — for example, allowing the Trial Chamber judges themselves to view the documents at issue, albeit under very limited circumstances — the Chamber found the conditions unacceptable, holding that the stay would not be lifted unless at least two conditions were met: first, that the Chamber be permitted continuing access to the relevant material, and second, that there be some “real prospect” that the accused would be given sufficient access to any documents that the Chamber determined were necessary to a fair trial.

On October 21, 2008, the Appeals Chamber issued a judgment affirming the Trial Chamber’s decision to stay the proceedings against Lubanga, but overturning the Trial Chamber’s conclusion that the release of the accused was *required* as a result of the stay. Instead, the Appeals Chamber held, the Trial Chamber must determine whether the continued provisional detention of the accused is warranted in light of all relevant factors, including the likelihood that he will appear for trial in the event the stay is lifted, the possibility that he will obstruct or endanger future proceedings in his case, and whether detention is necessary to prevent the accused from continuing with the commission of the charged crime or another crime within the statute of the Court.

In the meantime, the Prosecution once again submitted a motion before the Trial Chamber requesting that the stay of proceedings be lifted, this time proposing a solution that seems to satisfy the Chamber’s conditions for going forward with the trial. Specifically, the Prosecution indicated it had secured permission to fully disclose the relevant documents to the Trial Chamber. Furthermore, in the event that the Chamber determines a document must be turned over to the defense to guarantee a fair trial, the Prosecution stated it would seek ways to

disclose the material in a manner satisfactory to the information providers, or amend or drop the charges to render the information no longer relevant to the proceedings. Both the question of Mr. Lubanga’s continued detention and the Prosecution’s latest request to lift the stay of proceedings are pending as of this writing.

##### *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*

On September 26, 2008, Pre-Trial Chamber I confirmed the majority of the charges alleged against Germain Katanga and Mathieu Ngudjolo Chui, thereby sending the case to trial before the ICC. Both Katanga, a senior commander of the *Force de Resistance Patriotique*, and Ngudjolo Chui, a commander of the National Integrationist Front, were charged with a range of war crimes and crimes against humanity, including crimes involving sexual slavery and murder, allegedly committed during the February 3, 2007 attack on the village of Bogoro in the province of Ituri. The cases against the two accused were joined on March 10, 2008.

The confirmation hearing in the *Katanga & Ngudjolo Chui* case commenced on June 27, 2008 and lasted two weeks. According to Article 61(7) of the Rome Statute, on the basis of the hearing, the Pre-Trial Chamber had to determine whether there was sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. In its September 26 decision, the Pre-Trial Chamber unanimously confirmed that there were substantial grounds to believe the two accused were criminally responsible for the war crimes of using children in the context of international armed conflict, directing an attack against a civilian population, willful killing, destruction of property, and pillaging, while dismissing the charges of inhuman treatment and other outrages upon personal dignity as war crimes. In addition, the Chamber confirmed the charges against each of the accused relating to murder as a crime against humanity. The majority of the Chamber, Judge Anita Ušacka dissenting, also confirmed the charges of the sexual slavery and rape both as war crimes and crimes against humanity, but declined to confirm the charge of other inhumane acts as a crime against humanity.

### Criticisms About the Investigation and Prosecution of Gender-Based Crimes by the OTP

Over the past two years, the ICC Prosecutor, Luis Moreno Ocampo, has faced criticism from non-governmental organizations and other commentators regarding the Office of the Prosecutor's (OTP) record of investigating and prosecuting gender-based crimes. The Prosecutor is required, under Article 54(1)(b) of the Rome Statute, to "ensure the effective investigation and prosecution of crimes . . . in particular where it involves sexual violence [or] gender violence." However, the Prosecutor's first case arising out of the DRC situation, brought against Thomas Lubanga Dyilo, omitted charges for sexual violence despite well-documented evidence that such crimes were perpetrated by Lubanga's forces.

It seems that the OTP's investigation and prosecution of gender-based crimes is improving as the office develops, although the process still has weaknesses. The more recent charges in the DRC situation — against Germain Katanga and Mathieu Ngudjolo Chui — include charges for gender-based crimes. However, the charges based on sexual slavery in the original indictment were removed after two of the Prosecution's witnesses were initially denied protection from the Registrar and were prohibited from testifying. When the Registrar changed course and accepted the witnesses into the Court's Witness Protection Program, the Prosecutor reinstated the charges of sexual slavery as both a war crime and a crime against humanity, and added the charges of rape as a war crime and a crime against humanity. Finally, the most recent arrest warrant approved by the ICC, that issued against Jean-Pierre Bemba Gombo for crimes committed in the Central African Republic, included the charges of rape as a war crime and as a crime against humanity. While some human rights groups were disappointed that more gender-based charges were not included in Bemba's arrest warrant, the Prosecutor has indicated that he intends to continue investigation and to add charges where appropriate.

### Prosecution Requests Arrest Warrant Against Omar Hassan Ahmad al-Bashir

On July 14, 2008, the ICC Prosecutor submitted an application for a warrant of arrest against Sudanese President Omar Hassan Ahmad al-Bashir. According to the Prosecution, al-Bashir should be held criminally responsible for ten counts of crimes against humanity, war crimes, and genocide committed in the Darfur region of Sudan, including acts of rape as genocide. As of this writing, Pre Trial Chamber I is still reviewing the evidence to see if there are reasonable grounds for believing al-Bashir is responsible for the crimes alleged by the Prosecution and, if so, whether an arrest warrant is the appropriate means of securing the accused's presence at trial. On October 16, 2008, the Chamber requested that the Prosecutor submit additional materials concerning confidential aspects of the request for an arrest warrant by November 17, 2008.

The ICC has already issued two arrest warrants in connection with the situation in Darfur, which was referred to the ICC by the United Nations Security Council, acting pursuant to the Rome Statute, in March 2005. Yet Sudan, which is not party to the Rome Statute, has rejected the notion that the ICC may exercise jurisdiction over its nationals. Al-Bashir has also denied the basis for the crimes alleged against him by the ICC Prosecutor, saying that mass rape "does not exist" in Darfur and that the other crimes are similarly fabricated and untrue.

Although much support has been expressed for the Prosecution's move — both by international criminal lawyers and by Darfuris who have fled the country — Sudan has demanded that the Security Council use its authority under the Rome Statute to defer the proceedings against al-Bashir. Thus far, Sudan has succeeded in gathering the support of about half of the Security Council members, including China, a permanent member with veto power. Those supporting suspension are supposedly concerned with how the indictment will affect the peace process between Darfuri rebels and the central government. In addition, Assistant Secretary-General for Peacekeeping Edmond Mulet recently told the Security Council that the arrest warrant had the potential to derail the 2005 peace agreement between Sudan's Muslim

government in the north and the Christian and Animist rebels in the south. Others argue that a Security Council intervention would undermine the principles of combating impunity and deterrence, and that there is no real peace process in Darfur to maintain.

### Sudan Arrests Janjaweed Leader Sought by ICC

On October 13, 2008, the Government of Sudan arrested Ali Kushayb, a Janjaweed militia leader charged with a leading role in attacks in west Darfur. The ICC issued an arrest warrant for Kushayb in February 2007. Yet Sudan has declared its intention to try him in its own courts rather than turning him over to the ICC. This could be seen as an attempt by the government of Sudan to bypass the ICC by showing the country is "willing and able" to try the case on its own, thereby divesting the Court of jurisdiction under the so-called "complementarity" provision of the Rome Statute.

The Sudanese government has also said that it will consider removing from the cabinet Ahmed Haroun, state minister for humanitarian affairs, who has also been indicted by the ICC. However, the government maintains that it will not turn him over to the Court, but rather will conduct its own investigation into the allegations.

On October 18, the Prosecutor announced he would bring to the Court charges against rebel commanders in Darfur for attacking African Union peacekeepers in July 2008.

### Situation in the Central African Republic (CAR)

Belgian authorities arrested Jean-Pierre Bemba Gombo, the first person charged in connection with the situation in the CAR, on May 24, 2008 pursuant to an arrest warrant issued by the ICC. He was transferred to The Hague on July 3 and remains in the Court's custody pending a hearing to confirm the charges alleged against him, which is scheduled to commence December 8, 2008.

Bemba is a DRC national, however he is accused of crimes committed in the CAR through his role as the leader of a rebel group known as the *Mouvement de Liberation du Congo* (MLC). Bemba allegedly established the MLC in 1998 in Kisangani, DRC, and then directed its efforts to the

CAR in 2001 to help the incumbent president of CAR counter one of several *coup d'états*. The MLC intervened again in 2002 through 2003, committing large-scale crimes against the CAR civilian population both times. Bemba is charged with five counts of war crimes and three counts of crimes against humanity allegedly committed in the territory of the CAR from October 25, 2002 to March 15, 2003.

Following his role as leader of the MLC, Bemba returned to the DRC and became a vice president in that country's transitional government from July 2003 to December 2006. He also ran for president in the DRC election, receiving the second highest number of votes. Although he was elected a Senator in January 2007, he was forced to flee the DRC two months later after an outbreak of fighting involving his personal guard.

### THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

#### Victim Participation in the ECCC

The Extraordinary Chamber in the Courts of Cambodia (ECCC) is pioneering a new path in international criminal law by allowing victims to participate as civil parties in the legal proceedings against former Khmer Rouge leaders. Under the Internal Rules, civil parties have the right to legal representation, to participate in pre-trial investigation, to call witnesses, to question the accused, and to claim reparations. However, granting victims these rights poses significant challenges to an already under-resourced court.

In facing these challenges, the court attempts to balance the rights of the individual victims with judicial efficiency and economy. One major problem is the sheer number of victims applying for civil party standing. As of October 9, 2008, the court has processed and accepted only 8 of the more than 1,200 applications received. Even with the small number of civil parties currently participating, the court has already experienced delays resulting from their involvement in pre-trial hearings.

Furthermore, while the court gives civil parties the right to legal representation, many are unable to afford it on their own. The court has attempted to address this challenge by requesting funds in the 2008–2009 budget that would provide a legal team to unrepresented civil parties.

The participation of victims as civil parties also brings up new issues for the court to face, particularly in the area of sexual violence. In October 2008, the first civil party complaint for gender-based crimes came before the ECCC. The application requested that the court investigate crimes of sexual violence and include those claims in the prosecution of Khmer Rouge leaders and their subordinates. Many hope that these investigations could empower other victims of sexual violence to demand justice for the crimes perpetrated against them.

Despite the challenges in allowing victims to participate in the legal proceedings, the court has not abandoned its cause. Instead, it continues to wrestle with the difficulties in an attempt to achieve justice for each and every victim.

#### Corruption Stalls Progress in the ECCC

Progress in prosecuting former members of the Khmer Rouge has been slow as the Extraordinary Chambers in the Courts of Cambodia (ECCC) have experienced an increase in criticism during the last year. In particular, the ECCC has been charged by funding sources, the media, and the international community with pervasive corruption that has resulted in profound delays in the delivery of justice.

The ECCC has made some notable progress in the way of preliminary decisions since its inception in 2006, including its first public hearing, on the pretrial detention of Kaing Guek Eav (also known as Duch), who commanded the infamous Khmer Rouge torture center, Toul Sleng. In spite of this progress and the arrests of high profile officials like Khieu Samphan, who served as head of state during the Khmer Rouge era, the Chambers have been plagued with various setbacks and have yet to hold their first trial. With a timeline to wrap up operations in Cambodia by 2010, the ECCC must act to expeditiously try those charged.

In July 2008, the United Nations (UN) received a number of complaints that kickbacks were being paid by the ECCC's Cambodian staff in order to retain their positions. Reportedly a common practice in other areas of government work in Cambodia, such corruption caused many international funding sources to withhold funds while the UN responded to the charges. As a result, the approximately

250 Cambodian staff had their paychecks withheld. Given the hybrid nature of the tribunal with a system that integrates Cambodian and international workers, the functioning of the ECCC is threatened by the possibility that Cambodian workers will leave their employment if they remain unpaid. Although the UN is attempting to investigate the complaints, the Cambodian government asserts that it holds jurisdiction over these allegations.

The tension over defining the proper authority to review the recurring complaints of corruption and kickbacks is symptomatic of the setbacks of the ECCC. In its October 2008 update on developments in the ECCC, the Open Society Institute's Justice Initiative noted problems of inadequate transparency and administrative divisions stemming from corruption allegations and recommended that donors condition funding on "the meaningful resolution of longstanding concerns about perceived corruption at the ECCC."

Given conflicts over jurisdiction, no progress has been made towards resolving corruption allegations. Nonetheless, Australia has recently announced its allocation of nearly \$3.5 million to support the ECCC. Despite widespread fears of corruption within the ECCC, the international community and donors remain committed to the fair and timely completion of the trials, keeping in mind that the old age and health conditions of many of the accused require that justice be rendered before it is too late. **HRB**

*Shaleen Brunsdale, a J.D. candidate at the Washington College of Law, covers the ICTY for the Human Rights Brief.*

*Rita Espinoza, a J.D. candidate at the Washington College of Law, wrote the Prosecutor v. Nahimana, et al. summary for the Human Rights Brief.*

*Sarah Venti, a J.D. candidate at the Washington College of Law, wrote the Prosecutor v. Moinina Fofana and Allieu Kondewa summary for the Human Rights Brief.*

*Katherine Anne Cleary, Assistant Director of the War Crimes Research Office at the Washington College of Law, edited the Prosecutor v. Nahimana summary, the Prosecutor v. Moinina Fofana summary, and the ICC and ECCC Updates for the Human Rights Brief.*