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## Updates from the International Criminal Courts

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# UPDATES FROM THE INTERNATIONAL CRIMINAL COURTS

## INTERNATIONAL CRIMINAL TRIBUNAL OF THE FORMER YUGOSLAVIA

### PROSECUTOR V. MILOMAR STAKIC, CASE NO. IT-97-24-T

On July 31, 2003, Trial Chamber II (Trial Chamber) of the International Criminal Tribunal for the Former Yugoslavia (ICTY) delivered its judgment in the case of *Prosecutor v. Milomar Stakic*. The fourth amended indictment charged Stakic with genocide; complicity in genocide; extermination, murder, persecution, deportation, and inhumane acts (forcible transfer) as crimes against humanity; and murder as a violation of the laws of war.

Milomar Stakic (Stakic) was charged with individual criminal responsibility under article 7(3) of the ICTY Statute. He was convicted of extermination and deportation as crimes against humanity, persecutions incorporating murder as a crime against humanity, and murder as a violation of the laws and customs of war. The Trial Chamber thereby sentenced Stakic to life imprisonment.

### Background

Dr. Milomar Stakic lived in the municipality of Prijedor in Serbia, and though he was a physician by profession, he quickly rose through the ranks of the local Serbian nationalist political groups after 1990, when the Yugoslav Communist Party split along ethnic lines and the former Yugoslavia started to break up. On January 7, 1992, Stakic was elected president of the Assembly of the Serbian People of Prijedor Municipality, established pursuant to a directive from the Serbian Democratic Party (SDS) in Sarajevo, the head of which was Radovan Karadzic.

On April 30, 1992, the SDS seized power in Prijedor by force and installed Milomar Stakic as President of the Municipal Assembly, removing the democratically elected Municipal Assembly President Muhamed Cehajic. Simultaneously, Stakic assumed the post of President of the Prijedor Municipal People's Defence Council. In May 1992, he became President of the SDS Crisis Staff of the Municipality of Prijedor and continued to preside over the body through various successive incarnations. These bodies, and thus Stakic, either *de jure* or *de facto* held extraordinary

executive and legislative power in Prijedor during the relevant period of April 1992—September 1993, the beginning of the Second Yugoslav War.

During the period covered in the indictment, the army of the Serbian Republic of Bosnia and Herzegovina waged several attacks against Muslim villages in the area of Prijedor, including Hambarine and Kozarac. Although the Serbian authorities claimed the attacks were reactions to mild incidents of Muslim unrest in the area, the Trial Chamber recognized this as a pretext for initiating full-scale armed conflict against the civilian population and non-Serb paramilitary groups in the area.

“Captured persons” from these attacks were taken to the Omarska, Keraterm, and Trnopolje camps set up by the Crisis Staff. The Crisis Staff also determined who would run the camps. Once at these camps, the majority of Muslim civilian prisoners were denied adequate food, water, and shelter. They were regularly interrogated and beaten, sometimes to death. The women were raped and sexually abused. Conditions at Omarska camp were the worst, with people packed in so tightly that they would sometimes suffocate during the night. The food was usually spoiled and meals were often accompanied by beatings.

### Analysis

The Trial Chamber found that the mode of liability was best described in the instant case as “co-perpetratorship.” It established this by considering Stakic’s association with authorities in the Prijedor area; their common goal of consolidating Serbian control of the municipality; Stakic’s agreement or silent consent in activities during and after the forcible takeover of the municipality; the coordinated cooperation between the Serb civilian authorities, the military, the Prijedor Territorial Defence (TO), and the police; the joint control over criminal conduct; and Stakic’s authority as the leading political figure during the relevant period. This list constituted the evidence of Stakic’s acts for the purposes of establishing his “co-perpetratorship.” The mental element of criminal liability was constituted by Stakic’s mutual awareness of the substantial likelihood that crimes would occur and his awareness of the importance of his own role. The Trial Chamber thus

concluded that Stakic was criminally liable for the crimes charged. The Trial Chamber convicted Stakic of murder as a violation of the laws of war. First, it established that there had been an armed conflict in the municipality during the relevant period. Second, it established a nexus between the armed conflict and Stakic’s acts. After reviewing the acts that occurred in the Municipality, as well as Stakic’s role, the Trial Chamber concluded that Stakic was fully aware that large numbers of killings were being committed in the camps he established. In addition, the Trial Chamber found that large numbers of killings occurred during transports to camps and expulsions of non-Serbs from the Municipality. Finally, Stakic’s knowledge of the criminal acts was proven by evidence showing that he took an active role in the organization of the displacement of the non-Serb population out of Prijedor.

The Trial Chamber convicted Stakic of extermination, deportation, and persecutions incorporating murder as crimes against humanity. First, the Trial Chamber conclusively established all of the chapeau elements of crimes against humanity. The chapeau elements are those that apply equally to all of the enumerated crimes listed under the heading “crimes against humanity.” The enumerated crimes then each have their own elements. Thus, the Trial Chamber concluded that there was an attack in Prijedor, the acts of Stakic were part of the attack; the attack was widespread and systematic and directed against a civilian population; and Stakic must have known that his acts constituted part of a pattern of the crimes directed against a civilian population and that his acts fit into such a pattern.

The Trial Chamber found that in relation to the murder charge, if Stakic was responsible for murder under article 3 of the Statute (as discussed above), then he was also responsible under article 5 of the statute (Crimes Against Humanity). The Trial Chamber then considered the extermination charge, noting that Stakic incurred criminal liability for more than 1,500 deaths. The Chamber noted that it determined the massiveness of an extermination on a case by case basis. It also stated that each of the four considered acts—the massacre in Room 3 of Keraterm camp; the killing of approximately 120 persons in an organized way in Keraterm camp; the execu-

tions at Koricanske Stijene on Mount Vlasic on August 21, 1992; and the Serb armed attack on the mainly Croat village of Brisevo—would have been sufficient alone for a finding of massiveness. Thus, the Chamber found that the killings were part of a campaign of annihilation and fulfilled the requisite element of massiveness for the charge of extermination. The Chamber also stated that the acts of extermination were committed by Stakic.

With regard to the deportation charge, the Trial Chamber found that the atmosphere in Prijedor during the relevant period was so coercive that the persons giving up their homes could not be considered as having voluntarily done so. The evidence also indicated that Stakic took measures to facilitate the expelling of non-Serbs from the municipality. Thus, the Trial Chamber found that Stakic intended to, and did, deport the non-Serb population from the municipality. The Trial Chamber also convicted Stakic of persecution as a crime against humanity, noting that some of the acts of persecution had been covered in the previous convictions. However, some acts were committed with the discriminatory intent necessary for persecution such as murder; torture; physical violence; rapes and sexual assaults; constant humiliation and degradation; destruction, willful damage, and looting of residential and commercial properties; destruction of or willful damage to religious and cultural buildings; denial of fundamental rights, including the right to employment, freedom of movement, proper judicial process, and medical care; and deportations and forcible transfer.

The Trial Chamber found Stakic not guilty of genocide and complicity in genocide. It noted that genocidal intent was not proven beyond a reasonable doubt. For instance, Stakic had not made use of hateful terminology or made statements that specifically advocated killings of non-Serbs. The Trial Chamber noted that Stakic's primary goal was to establish a Serbian municipality, not necessarily to destroy the Muslim ethnic group.

## Conclusion

In this case, the Trial Chamber discussed in new terminology the mode of liability incurred by Milomar Stakic, using the phrase "co-perpetratorship." The Trial Chamber set out a number of factors it considered relevant to finding "co-perpetratorship," including a common plan for Serbian domination of the Prijedor area and Stakic's agreement or silent consent to activities during and after the

takeover of power in Prijedor. This mode of liability represents a new development in the jurisprudence of the ICTY and may be useful for the flexibility it gives prosecutors to indict persons on a theory of responsibility that may not be clearly individual or superior criminal responsibility, but somewhere in the middle.

## INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

### *PROSECUTOR V. FERDINAND NAHIMANA, JEAN-BOSCO BARAYAGWIZA, HASSAN NGEZE, THE "MEDIA CASES,"* CASE NO. ICTR-99-52-T

On December 3, 2003, Trial Chamber I (Trial Chamber) of the International Criminal Tribunal for Rwanda (ICTR) delivered its judgment in the well-known "Media Cases," which focused on the use of the media to incite violence during the 1994 genocide. The three defendants were charged in separate indictments but were tried jointly. They were all charged with genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, and crimes against humanity of persecution and extermination. In addition, the ICTR charged defendants Nahimana and Barayagwiza with murder as a crime against humanity. Barayagwiza was charged with serious violations of article 3 common to the Geneva Conventions and of Additional Protocol II, which covers war crimes in non-international armed conflicts, such as the one in Rwanda.

The prosecutor charged the defendants with individual criminal responsibility under article 6(1) of the ICTR Statute. In addition, Nahimana's indictment included a charge of superior responsibility under article 6(3) for direct and public incitement to commit genocide and the crime against humanity of persecution. Barayagwiza and Ngeze's indictments included a charge of superior responsibility under article 6(3) with respect to all counts except conspiracy to commit genocide. The Trial Chamber convicted all three defendants of conspiracy to commit genocide, genocide, direct and public incitement to commit genocide, persecution as a crime against humanity, and extermination as a crime against humanity.

The Trial Chamber thereby sentenced defendants Nahimana and Ngeze to life imprisonment and defendant Barayagwiza to a sentence of twenty-seven years, three months and twenty-one days in prison.

## Analysis

The Trial Chamber noted first that this case raised important issues concerning the role of the media that have not been addressed at the level of international criminal justice since the trials of Nazi war criminals after World War II. For that reason, the outcome of this case is particularly important to international criminal jurisprudence and the role that the media has in instigating and perpetuating genocide and crimes against humanity.

Hassan Ngeze, a journalist, was the owner and editor of the newspaper *Kangura*, which was a source of information after the death of President Juvenal Habyarimana of Rwanda on April 6, 1994, and during the height of the genocide. The Trial Chamber notes that *Kangura* was widely read nationally as well as internationally. The paper was published in Kinyarwanda (the primary Rwandan language) and French. The Trial Chamber found that articles and editorials published in *Kangura* conveyed contempt and hatred for the Tutsi ethnic group and particularly for Tutsi women. The cover from an issue of *Kangura*, for example, prominently displayed the question, "What weapons shall we use to conquer the *Inyenzi* (ethnic Tutsi Rwandans) once and for all?", with a picture of a machete. The Trial Chamber found that this statement constituted genocidal intent on the part of Ngeze.

The Trial Chamber found that Ngeze helped secure, distribute, store, and transport weapons to be used against the Tutsi population. He set up, operated and supervised roadblocks where Tutsi civilians were stopped and taken to the *Commune Rouge* (a killing ground in north-west Rwanda) to be killed. Ngeze also drove with a megaphone in his vehicle, attempting to mobilize the Hutu population to come to CDR (a Hutu power movement group) meetings and inciting extermination of the *Inyenzi*. The Trial Chamber found these actions to constitute instigation for the killing of Tutsi civilians. In addition, on the morning of April 7, 1994, Ngeze ordered the *Interahamwe* (Rwandan rebel militia) to kill Tutsi civilians and prepare for their burial at *Commune Rouge*. Many Tutsis were killed in attacks that occurred that day. The Trial Chamber determined that Ngeze was individually criminally responsible pursuant to article 6(1) of the ICTR Statute as founder and editor of *Kangura*, as well as for acts of ordering, inciting, aiding, and abetting the killing of Tutsi civilians.

Also during the genocide, Ferdinand Nahimana, professor of history and Dean of

the Faculty of Letters at the National University of Rwanda, co-founded a radio station called RTLM, which thereafter became very popular with the Hutu population. Nahimana was responsible for allowing the highly inflammatory broadcasts of RTLM and admitted that he was happy that RTLM had been instrumental in awakening the Hutu majority against the “enemy” Tutsi population. He considered RTLM an important part of the “war of media, words, newspapers and radio stations” that accompanied the bullets. The Trial Chamber considered these statements conclusive evidence of intent to destroy, in whole or in part, the Tutsi ethnic group. RTLM also broadcasted the names of Tutsi individuals and their families. In some cases, these persons were subsequently killed. The Trial Chamber found that this established a specific causal connection between the RTLM broadcasts and the killings and that Nahimana’s role in the creation and control of RTLM established his individual criminal

responsibility under article 6(1) of the ICTR Statute.

Jean-Bosco Barayagwiza, a lawyer and Director of Political Affairs in the Rwandan Ministry of Foreign Affairs, founded the political group CDR, which spearheaded the Hutu power movement. He also co-founded RTLM and was a member of its steering committee. The Trial Chamber found that CDR created a political framework for the killing of Tutsi and Hutu political opponents by convening meetings, holding demonstrations, establishing roadblocks, distributing weapons, and organizing and carrying out the killing of Tutsi civilians. The Trial Chamber found that Barayagwiza played a critical role in planning and orchestrating the delivery of weapons used in planning attacks on April 7, 1994. In addition, the Trial Chamber noted that Barayagwiza said publicly, “Let’s exterminate them,” meaning the Tutsis, and threatened to kill them, saying it would not be hard. The

chamber found that these words and deeds made clear Barayagwiza’s “ruthless commitment” to the destruction of the Tutsi population. The Trial Chamber also found Barayagwiza individually criminally responsible for his role in the creation and control of RTLM and individual and superior responsibility for instigating the acts of genocide by CDR members.

### Conclusion

The Trial Chamber stated that although the downing of the plane of the president on April 6, 1994, may have triggered the genocide that followed in Rwanda, the RTLM, *Kangura*, and CDR were the “bullets in the gun.” The Trial Chamber notes that “the gun had such a deadly impact because it was loaded.” *HRB*

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### United Nations Update *continued from page 34*

#### THE PALESTINIAN AUTHORITY’S LEGAL POSITION

The Palestinian Authority recognizes Israel’s right to “undertake certain limited measures in cases of strict military necessity.” Under the Palestinian Authority’s view, the Barrier is a violation of international human rights and international humanitarian law because it is not “justified by military necessity,” contrary to the Fourth Geneva Convention. The Palestinian Authority asserts that the Barrier violates the principle of proportionality and requests that Israel be held accountable for human rights violations. Claiming the requirement of proportionality would be met if the line were built according to the Green Line, the Palestinian Authority urges Israel to evacuate Israeli nationals, rather than Palestinians, when constructing the Barrier.

The Palestinian Authority also views the Barrier as an attempt by the Government of Israel to annex Palestinian occupied territory in violation of international law. By building the Barrier on land in significant departure from the Line, the Palestinian Authority’s views Israel as attempting to expropriate land occupied by the Palestinians. The damages caused by the Barrier that the Palestinian Authority cites include the “extensive destruction of Palestinian homes and other property and appropriation of property not justified by military necessity, contrary to the Fourth Geneva Convention.” The Palestinian Authority also claims the Barrier is interfering with

Palestinians’ rights to work, education, health care, and freedom of movement in violation of the International Covenant on Economic, Social and Cultural Rights.

#### THE ICJ’S ROLE

Replacing the Permanent Court of International Justice, the Hague-based Court began work in 1946, under the auspices of the Charter of the United Nations. Comprised of 15 judges elected to nine-year terms of office by the Assembly and the Security Council, the Court is the main judicial body of the United Nations. The Court has the dual role of settling legal disputes submitted to it by states and providing advisory opinions on legal questions referred to it by authorized international organs and agencies.

At present, the only bodies authorized to submit a request to the Court for an advisory opinion are the five main organs of the UN and the sixteen specialized agencies of the UN family, including the International Labour Organization, the International Monetary Fund, and the International Atomic Energy Agency. The Court has issued twenty-four advisory opinions to date, including a ruling on the territorial status of South-West Africa (Namibia) and Western Sahara.

The Court issued an order organizing the proceedings on December 19, 2003, allowing all member states of the Assembly to submit written statements concerning the issue until January 30, 2004. The Court also noted that

since Palestine has been granted “special observer status” in the Assembly and co-authored the draft resolution requesting an advisory opinion, Palestine may also submit a written statement. All of the member states, including Palestine, may present statements and comments to the Court during oral hearings set to open on February 23, 2004.

### CONCLUSION

Security and lasting peace for both Israelis and Palestinians is of paramount importance to both parties and to the international community. With the international support of the Mideast Road Map, developed by the United States, Russia, the UN, and the European Union, Israel’s construction of the Barrier cannot be viewed as a good-faith attempt to enter into successful negotiations. The placement of the Barrier in departure from the Armistice Line of 1949 is an impediment to negotiations for a lasting peace and security between Israel and the Palestinian leadership. While Israel emphatically maintains that the Barrier is temporary, the expense, effort, and placement of the Barrier imply that it is a more permanent solution. The Court’s advisory opinion on this issue, though not binding on Israel’s actions, should be respected and upheld by both the Israeli and Palestinian leadership, as well as the international community. *HRB*

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