

2006

## Updates from the International Criminal Courts

Elizabeth J. Rushing

*American University Washington College of Law*

Nick Leddy

*American University Washington College of Law*

Anne Heindel

*American University Washington College of Law*

Angela Edman

*American University Washington College of Law*

Bjorn Sorenson

*American University Washington College of Law*

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/hrbrief>



Part of the [Human Rights Law Commons](#), and the [International Law Commons](#)

---

### Recommended Citation

Rushing, Elizabeth J., Nick Leddy, Anne Heindel, Angela Edman, and Bjorn Sorenson. "Updates from the International Criminal Courts." Human Rights Brief 14, no. 1 (2006): 38-43.

This Column is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Human Rights Brief by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact [kclay@wcl.american.edu](mailto:kclay@wcl.american.edu).

# UPDATES FROM THE INTERNATIONAL CRIMINAL COURTS

## INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

On September 27, 2006, tribunal judges at the International Criminal Tribunal for the Former Yugoslavia (ICTY) sentenced Momailo Krajisnik to 27 years imprisonment. Krajisnik, a former Bosnian-Serb leader, was convicted of persecutions, murder, extermination, deportation, and forced transfer of non-Serb civilians. After establishing the existence of a joint criminal enterprise intended to reduce the proportion of Bosnian Muslims and Bosnian Croats, the judges found that Krajisnik's role in the crimes was "crucial" because of his senior position. The Trial Chamber acquitted Krajisnik of genocide, complicity in genocide, and one count of murder as a violation of the laws or customs of war, noting that he did not have the specific intent necessary for genocide.

On May 3, 2006, the ICTY Appeals Chamber affirmed the sentences for Mladen Nalelitic ("Tuta"), and Vinko Martinovic ("Stela"). Naletilic was found guilty on eight counts of crimes against humanity and war crimes and Martinovic was found guilty on nine counts of crimes against humanity. The judges dismissed most of the appeals pertaining to issues of due process, evidence, and crimes involved in the trial of the two Bosnian Croats. The Chamber found that, given the particular circumstances of the case and the defendants' degree of participation, the sentences of 20 and 18 years' imprisonment were reasonable. Both men had served as military commanders in the Mostar region of Croatia between April 1993 and January 1994.

On June 30, 2006, the ICTY Trial Chamber sentenced Naser Oric, former senior commander of Bosnian Muslim forces, to two years' imprisonment. Oric was convicted for failing to exercise command responsibility to prevent the murder and cruel treatment of numerous Serb prisoners in the former UN "safe area." ICTY judges described the conditions in and around Srebrenica, Oric's perimeter of command, at the time of the crimes in 1992 and 1993 as more abysmal than any other case before the Tribunal. The judges convicted Oric because he had reason to know about the murders and cruel treatment but failed to take "necessary and reasonable measures" to prevent their occurrence.

The month of July brought with it two new trials for the ICTY. In *Popovic, et al.*, seven senior Bosnian Serb military and police officers will face charges of genocide and various crimes against humanity for acts committed in Srebrenica. In *Milutinovic, et al.* the Tribunal will try six former high-level political and military leaders of Serbia and the Federal Republic of Yugoslavia (FRY), charged with alleged crimes committed in Kosovo during 1999.

## INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

The International Criminal Tribunal for Rwanda (ICTR) Appeals Chamber delivered a landmark decision on June 16, 2006, in the case of *Prosecutor v. Karemera, Ngirumpatse and Nziirorera*. The opinion recognized that genocide occurred in Rwanda during the period of April 6 to July 17, 1994 — holding that the genocide is now a matter of "common knowledge." This opinion has now indisputably established Rwanda's genocide in the ICTR's jurisprudence. The *Karemera* decision is significant because it removes the requirement of proving genocide in every case, silencing the rejectionist camp. The decision will have a significant impact on future defendants accused of genocide by eliminating the perpetual relitigation of the established historical fact of Rwanda's genocide.

On September 12, 2006, Trial Chamber I acquitted Jean Mpambara, former mayor of the Rukara commune in Rwanda. Mpambara was accused of planning, directing and facilitating attacks against Tutsi civilians. The Chamber held that the prosecution failed to prove the charges beyond a reasonable doubt. In acquitting Mpambara, Judge Jai Ram Reddy said that the evidence establishing his instigation and assistance in the attacks was not credible. Further, the Chamber held that on occasion Mpambara's inaction was due to a lack of resources for an effective defense against the attackers. Residents of the former Rukara commune have expressed disappointment over the acquittal.

In another ruling the same week, the ICTR sentenced Tharcisse Muvunyi to 25 years for genocide, direct and public incitement to commit genocide, and rape as a crime against humanity. Muvunyi was a former commander

of Ecole Sous-Officiers (ESO), a military academy in Butare, southern Rwanda. Soldiers under Muvunyi's command attacked between 800 and 5,000 Tutsi refugees in the Mukura Forest in April 1994. The court held that Muvunyi failed to use his authority to prevent his soldiers from participating in the genocide.

Finally, former education minister André Rwamakuba was unanimously acquitted on September 20, 2006, and immediately released. Rwamakuba had been charged with conspiracy to commit genocide, incitement of or complicity to commit genocide, as well as several crimes against humanity, serious violations of Common Article 3 to the Geneva Conventions, and violations of Additional Protocol II. The Chamber found that testimony demonstrated that Rwamakuba was not present at the time and location of the alleged events. Additionally, some of the prosecution's evidence was based on hearsay; hence, the prosecution did not meet its burden to prove the charges beyond a reasonable doubt.

In a related development, on September 18, 2006, the ICTR accepted the resignation of Callixte Gakwaya, a defence attorney at the ICTR accused of having participated in the genocide. Previously, Rwanda had shown concern over Gakwaya's involvement in the ICTR, and threatened to cease cooperation with the court unless he was fired. Gakwaya is listed as one of 12 genocide suspects employed at the ICTR. According to the ICTR, only two of these suspects are still employed and they are both currently under investigation.

## SYLVESTRE GACUMBITSI V. THE PROSECUTOR, CASE No. ICTR-2001-64-A

On July 6, 2006, the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) delivered its judgment in the case of *Sylvestre Gacumbitsi v. Prosecutor*. From 1983 through 1994 Sylvestre Gacumbitsi served as the highest-ranking local administrative official, or *bourgmestre*, of Rusumo Commune. On June 17, 2004, ICTR Trial Chamber III found Gacumbitsi guilty of genocide and the crimes of humanity of extermination and rape due to his role in organizing and executing a campaign against the Tutsi popula-

tion in Rusumo Commune in April 1994. Gacumbitsi received a thirty-year sentence.

Both Gacumbitsi and the Prosecutor appealed the conviction. The Appeals Chamber dismissed all of Gacumbitsi's grounds of appeal. It granted the Prosecutor's appeal in part, finding Gacumbitsi guilty of aiding and abetting the murder (as a crime against humanity) of two of his female Tutsi tenants. Additionally, while the Trial Chamber held that Gacumbitsi's authority for ordering the crimes committed in Nyarubuye Parish on April 15, 16, and 17 and in Kigarama on April 14 was limited to the communal police, the Appeals Chamber found that it also extended to several other groups of attackers. Based on these additional findings, the Appeals Chamber quashed the Trial Chamber's thirty-year sentence and imposed a new life sentence.

#### **GACUMBITSI'S APPEAL: "COMMITTING" GENOCIDE**

The Trial Chamber convicted Gacumbitsi of planning, instigating, ordering, committing, and aiding and abetting the crime of genocide pursuant to Article 6(1) of the Statute of the ICTR. In claiming that his conviction for "committing" genocide was based in errors of both law and fact, Gacumbitsi argued, *inter alia*, that the indictment did not allege his personal participation in the killing of Murefu, a Tutsi refugee, with sufficient specificity. Because the indictment merely alleged as a general matter that Gacumbitsi was responsible for killing "members of the Tutsi population," the Appeals Chamber found that Gacumbitsi could not have reasonably known on this basis alone that he was being charged with killing Murefu. Nevertheless, the Appeals Chamber found that a witness statement disclosed before trial provided "timely, clear, and consistent information" about the time, place, and manner of the killing and thus, sufficiently cured the defective indictment.

Presiding Judge Shahabuddeen wrote separately to argue that the Appeals Chamber imposed "too formulaic" pleading requirements on the Prosecution and should not have found the indictment defective with respect to the killing of Murefu because the crime of genocide does not require the pleading of every individual killing. Judge Shahabuddeen stressed the distinction between material facts necessary to establish an offense and the evidence offered to prove those facts, remarking that:

The material facts must be pleaded, the evidence need not. When an indictment alleges genocide, proof of any one killing is not a *material fact* as it would be in the case of murder; it is *evidence* of a material fact, namely that the intent of the accused was the destruction of a group, as a group.

In contrast, Judges Liu and Meron wrote separately to argue that the Chamber had been too lenient in finding that a "vague chart-entry summarizing the anticipated testimony of one witness" cured the indictment.

Notably, the Appeals Chamber determined that even if the killing of Murefu was set aside, the Trial Chamber's conclusion that Gacumbitsi "committed" genocide would still be valid. This decision was based on witness allegations that Gacumbitsi arrived at a church in Nyarubuye Parish with a pick-up truck full of machetes, ordered the Hutus to separate from the Tutsis, and instructed the Hutus and *Interahamwe*: "Get machetes! Start killing and surround the church so no one escapes." From these facts, the Appeals Chamber concluded that Gacumbitsi "directed" and "played a leading role in conducting and especially, supervising" the Nyarubuye massacre and that Gacumbitsi's act of separating the crowd was as much an integral part of the genocide as were the killings that it enabled. The Appeals Chamber thus determined that Gacumbitsi's conviction was appropriately characterized to include his "commission" of genocide. To this end, the Appeals Chamber held that in the context of genocide, "direct and physical perpetration" need not mean physical killing — other acts, such as directing or supervising killings, can constitute the *actus reus* of the crime.

#### **PROSECUTOR'S APPEAL: MURDER AS A CRIME AGAINST HUMANITY**

The Prosecutor appealed Gacumbitsi's acquittal for the murder as a crime against humanity of Marie and Beatrice, two of his Tutsi tenants. The Prosecutor advanced the theory that Gacumbitsi aided and abetted their murder, a mode of responsibility not considered by the Trial Chamber. The Appeals Chamber found that the Trial Chamber entered sufficient findings of fact to support a conviction under this theory of liability, including that Gacumbitsi expelled the women from his home in the context of the genocidal campaign in which he was involved, that he knew expelling them under these circumstances would expose them to the risk of being attacked on the grounds of their ethnic-

ity, and that they were subsequently killed. The language of the indictment was sufficiently clear for the Appeals Chamber to find that the accused had ample timely notice of this charge. The Appeals Chamber therefore entered a new conviction for aiding and abetting the crime against humanity of murder.

#### **PROSECUTOR'S APPEAL: RAPE AS A CRIME AGAINST HUMANITY**

The Trial Chamber convicted Gacumbitsi for eight counts of rape. However, it acquitted him on three additional counts after finding insufficient evidence to demonstrate that Gacumbitsi had instigated the crimes. The Prosecutor argued that the Trial Chamber "erred in law by requiring it to establish that the Appellant's instigation was a condition *sine qua non* of the commission of the rapes" and that it should have convicted Gacumbitsi on this basis, or in the alternative, for his Article 6(3) superior responsibility for the perpetrators.

The Appeals Chamber found that the Trial Chamber had applied the correct legal standard, noting that to convict someone of instigation it is sufficient for the Prosecution to demonstrate that "the instigation was a factor substantially contributing to the conduct of another person committing the crime," and that "it is not necessary to prove the crime would not have been perpetrated without the involvement of the accused." Moreover, despite the Trial Chamber's findings that Gacumbitsi drove around Nyarubuye Parish with a megaphone inciting Hutu men to rape and kill Tutsis and that a victim claimed one of her rapists told her Gacumbitsi had ordered the rape of Tutsi females, the Appeals Chamber held that the Prosecution did not prove the presence of a nexus between the instigation and the rapes beyond a reasonable doubt. In making this determination, the Appeals Chamber cited a lack of credible witness testimony and a lack of evidence that Gacumbitsi's words substantially contributed the three rapes, noting in particular that the Prosecutor did not establish the perpetrators' awareness of Gacumbitsi's inciting statements.

Nevertheless, the Appeals Chamber agreed with the Prosecutor that the Trial Chamber had a duty to consider in the alternative whether Gacumbitsi had Article 6(3) superior responsibility for these rapes. The Trial Chamber did not make any formal legal finding on this question, stating that it did not "deem it necessary to enquire whether [Gacumbitsi] is equally responsible pursuant to Article 6(3) ... given the similarity of the

acts charged and the lack [of] evidence of a superior-subordinate relationship between the Accused and the perpetrators of the rapes.” After looking at the relevant evidence, the Appeals Chamber agreed with the Trial Chamber that the Prosecution failed to offer sufficiently specific facts demonstrating Gacumbitsi’s effective control over the perpetrators of the rapes in question, and therefore denied the Prosecution’s appeal on this count.

The Prosecution also sought general clarification on the elements of rape as a crime against humanity. The Prosecution argued that in such a context, non-consent of the victim and the perpetrator’s knowledge of that non-consent should not be considered elements of the offense to be proved, but rather that consent should be considered an affirmative defense. The Prosecutor reasoned that when prosecuted at the ICTR, rape will always take place in the context of genocide, crimes against humanity, or war crimes. There should therefore be no need to prove the absence of consent, as is the case with other crimes in the statute such as torture. The Appeals Chamber reiterated the definition of the rape as a crime against humanity provided by the ICTY Appeals Chamber in the *Kunarac et al.* judgment, and found that it established non-consent and knowledge thereof as elements that the Prosecution must prove beyond a reasonable doubt. However, to prove the element of non-consent, the Prosecution need not provide evidence of the victim’s words or conduct, or evidence of force, but need only demonstrate the existence of coercive circumstances under which meaningful consent is not possible, i.e., the existence of a genocidal campaign or a situation of detention. Further, the Prosecution can establish knowledge of non-consent by proving the accused was aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine consent.

To rebut an allegation of non-consent, the accused may enter evidence that the victim consented, but such evidence is inadmissible pursuant to Rule 96(ii) if the victim “has been subjected to or threatened with or has reason to fear violence, duress, detention, or psychological oppression,” or “reasonably believed that if [one] did not submit, another might be so subjected, threatened, or put in fear.” Moreover, the Trial Chamber is free to disregard evidence of consent if it concludes that consent cannot be given voluntarily under the circumstances.

### PROSECUTOR’S APPEAL: JOINT CRIMINAL ENTERPRISE

The Prosecution also argued Gacumbitsi should have been found responsible for his crimes under the theory of joint criminal enterprise (JCE). The Appeals Chamber disagreed, citing the ICTY appeal judgment in *Kvočka* and holding that the Prosecutor’s failure to plead the category of JCE alleged and the supporting material facts in the indictment constituted a defect that neither the Prosecutor’s pre-trial brief nor its opening statement cured. In a separate opinion, Judge Shahabuddeen argued that the Prosecutor had provided the requisite notice. In his view, although the words “joint criminal enterprise” were not used in the indictment, the use of terms such as “acting in concert with others” in pursuit of a “common purpose” meaningfully informed Gacumbitsi of the JCE charge and enabled him to prepare an effective defense.

### PROSECUTOR’S APPEAL: AUTHORITY FOR ORDERING

In its judgment, the Trial Chamber found that Gacumbitsi ordered the crimes committed by the communal policemen in his commune, but that he did not have the authority to order the crimes committed there by the *conseillers*, *gendarmes*, *soldiers*, and *Interahamwe*. The Prosecution appealed this finding, alleging both an error of fact and an error of law. The Appeals Chamber found that the Trial Chamber correctly defined “ordering” to take place when someone in a position of authority instructs another to commit an offense. Moreover, “[n]o formal superior-subordinate relationship between the accused and the perpetrator is required. It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused’s order.”

Although it upheld the Trial Chamber’s citation of the relevant law, the Appeals Chamber found error with the Trial Chamber’s characterization of the relevant facts. Specifically, it recalled the Trial Chamber’s finding that as *bourgmestre*, Gacumbitsi was the “highest authority and most influential person on the commune, with the power to take legal measures binding all residents.” The Appeals Chamber then pointed to four consecutive days in April of 1994 where the Trial Chamber found that Gacumbitsi “instructed,” “ordered,” or “directed” groups of assailants — not just the communal policemen — to attack many Tutsi

civilians. For example, the Trial Chamber found that in Nyarubuye parish on April 16, 1994, Gacumbitsi “directed” an attack during which a group of assailants killed survivors and looted the parish building. According to the Appeals Chamber, these findings proved Gacumbitsi’s authority over all the attackers in question and that his orders had a substantial and direct effect on the commission of those crimes. It consequently upheld this sub-ground of the Prosecutor’s appeal.

### PROSECUTOR’S APPEAL: SENTENCING

The Prosecution alleged that the Trial Chamber erred in failing to impose a sentence reflecting the gravity of the crimes and Gacumbitsi’s degree of criminal culpability. While the Appeals Chamber held that the Trial Chamber properly stated the relevant sentencing principles, it argued that those principles were applied incorrectly. The Appeals Chamber noted that “Gacumbitsi played a central role in planning, instigating, ordering, committing, and aiding and abetting genocide and extermination in his commune of Rusumo, where thousands of Tutsis were killed or seriously harmed.” Citing Gacumbitsi’s instigation of particularly sadistic rapes, the absence of significant mitigating circumstances, and its findings on appeal, the Appeals Chamber quashed Gacumbitsi’s thirty-year prison sentence and imposed a life sentence in its place.

## INTERNATIONAL CRIMINAL COURT

### THE PROSECUTOR V. THOMAS LUBANG DYILO, CASE No. ICC-01/04-01/06

The International Criminal Court’s (ICC) first trial entered the pre-trial phase, but is encountering some difficulty. Chief Prosecutor Luis Moreno-Ocampo brought charges against Thomas Lubanga Dyilo of the Democratic Republic of the Congo (DRC) for crimes committed in his capacity as founder and leader of the Union of Congolese Patriots (UPC) and its military wing, the Patriotic Forces for the Liberation of the Congo (FPLC). The ICC investigation commenced in June 2004, two months after the DRC government referred the situation to the Court. Early in 2005 the government arrested Lubanga on charges of genocide, crimes against humanity, and war crimes. In March 2006 the ICC issued an arrest warrant charging Lubanga with the war crimes of enlisting, conscripting, and using children to partici-



pate in active hostilities. The DRC government immediately transferred Lubanga to ICC custody in the Hague. Several days later, he appeared before Pre-Trial Chamber I for initial proceedings.

The confirmation hearing, in which the Pre-Trial Chamber seeks to confirm whether there is sufficient evidence for the Prosecutor to conduct a trial, was originally scheduled for June 2006. The Court postponed the hearings until September due to escalating violence in Ituri, the site of Lubanga's alleged crimes. The Prosecutor delayed full disclosure of evidence to the defense, due partially to the escalating violence and in the interest of protecting victims and witnesses. In September the defense team requested more time to analyze the recently disclosed evidence and prepare a relevant defense. The Prosecutor requested a time extension as well. The Court subsequently announced that the confirmation hearing would take place on November 9, 2006.

The Court reached an impasse in June when the Prosecutor announced that, due to the violence in Ituri, he would temporarily stop the investigation. Thus, the charging document only accuses Lubanga of enlistment, conscription, and use of child soldiers; the Prosecutor decided that he would not add or amend other charges. While the conscription and recruitment of child soldiers in many ways facilitated these crimes, the fact remains that in the past six years, 60,000 people have been slaughtered in Ituri alone (according to United Nations estimates). The UPC/FPLC and other parties to the conflict committed mass murder, rape, and torture, crimes not addressed in Lubanga's charges. According to the most recent *Report on Prosecutorial Strategy*, in the interest of expediency, the Prosecutor may have decided to select a limited number of incidents for the arrest warrants; however, he has also committed to ensuring that those incidents will reflect the gravity of the accused's crimes. Many non-governmental organizations (NGOs) contend that by excluding grave crimes such as sexual violence, rape, willful killings, and summary executions, the Court is sending the message that perpetrators of those crimes will go unpunished. Impunity for gender crimes is considered especially troublesome.

The Prosecutor also faces increasing pressure to issue arrest warrants for members of other parties to the conflict. The conflict between the Hema ethnic group, represented by Lubanga's FPLC forces, and the Lendu

ethnic group, represented by Floribert Njabu's Front for National Integration forces, spread and became integrated into the larger regional conflict, and thus has many parties. Since the Office of the Prosecutor (OTP) suspended its investigation in the DRC due to security threats, Lubanga is the only individual that has been charged.

#### UPDATE ON THE UGANDA SITUATION

A year after the ICC unsealed its first arrest warrants, there have still been no arrests in Uganda. The Prosecutor, in his most recent report on Uganda, identified executing arrest warrants as one of the central challenges facing the Court. In September, Pre-Trial Chamber II requested that the Prosecutor submit a report on the status of arrests in Uganda, and the court reviewed the report in early October. One of the most significant setbacks occurred in July 2006, when Joseph Kony, indicted leader of the Lord's Resistance Army (LRA), initiated peace talks with the government of Uganda. Kony proposed an end to hostilities in exchange for amnesty to all LRA combatants. The government granted his request and signed the Cessation of Hostilities Agreement with the LRA on August 26. The amnesties have raised the question whether, in the interest of peace, the ICC should withdraw the arrest warrants. This is particularly relevant because Kony has refused to appear in public to advance the peace talks unless the ICC drops all charges against the LRA.

NGOs have campaigned on both sides of the issue in a debate commentators have termed "Peace vs. Justice." Proponents of an ICC withdrawal point to the merits of the traditional Acholi justice mechanism, which involves public ceremonies of confession and forgiveness, because it affords victims personalized truth and reconciliation. Many fear that if the ICC moves forward with the arrests, the LRA will abandon the peace talks and resume the violence. Groups advocating for the ICC to continue its investigation (including the ICC itself) invoke international law, which disallows amnesties for the grave crimes under investigation. In the past, exchanging amnesty for peace agreements has not been successful. For example, the amnesty of Sierra Leone rebel leader Foday Sankoh backfired and plunged the parties into deeper conflict. Furthermore, States Parties to the ICC (of which Uganda is one) are not permitted to renege on their referral of a situation to the ICC. Traditional Acholi justice mechanisms

also conflict with the traditions of non-Acholi groups similarly affected by the conflict.

The Prosecutor's recent report states that, contrary to some media reports, Ugandan President Yoweri Museveni has not requested that the Court withdraw its arrest warrants. The Ugandan government reportedly submitted a confidential letter to the Registry confirming its commitment to cooperate with the Court, and expressing its desire to conduct peace talks in a manner compatible with its obligations as a State Party. As stated in the report, the Prosecutor aims to continue investigations in a manner that will not disrupt the peace negotiations.

#### UPDATE ON DARFUR

On June 14, 2006, pursuant to Resolution 1593, Prosecutor Moreno-Ocampo presented his third report to the UN Security Council. He highlighted developments in the OTP's ongoing investigation of the situation in Darfur. Since the investigation commenced in June 2005, the OTP has conducted over 50 missions in 15 countries, interviewed hundreds of witnesses, and reviewed thousands of documents.

The ongoing violence has made it extremely difficult to collect information while ensuring the safety of victims, witnesses, and ICC staff. Sudanese President Omar al-Bashir has also stated that the ICC cannot conduct investigations inside Sudan. Due to these concerns, the Prosecutor has not conducted investigations in Sudan, instead relying on witnesses and information located outside of Sudan. Critics suggest that this concession to the Government of Sudan compromised the Court's neutrality, as the government is a party to the conflict and is therefore subject to ICC investigation. The question also remains whether an effective investigation is possible without entering the area in which the atrocities took place.

The Prosecutor's report also addressed the willingness and ability of the Special Criminal Court on the Events in Darfur to prosecute crimes in Darfur and provide justice to the victims. The Government of Sudan established the Special Court soon after the Security Council referred the situation to the ICC. Critics claim the Special Court is a contrivance designed to forestall ICC prosecutions. In February and June 2006, the OTP visited Khartoum to assess the Special Court proceedings in order to determine admissibility of possible cases before the ICC. The OTP

found evidence that the Special Court was not willing or able to investigate or prosecute crimes against humanity or war crimes, which are the focus of the ICC's investigations.

To date the Special Court has only conducted thirteen trials. The cases involved low-ranking offenders who committed minor offenses such as theft. The court has not addressed war crimes and crimes against humanity committed by Janjaweed, government, and rebel forces. NGOs report that the Special Court grants immunity to members of military and police forces, and does not recognize the doctrine of command responsibility, making prosecution of high-ranking officials unlikely. Victims, particularly those subjected to sexual violence, cannot complain for fear of further harassment. Based on the Special Court's limited caseload, the Prosecutor believes the cases under investigation are admissible to the Court.

The Prosecutor has identified several specific cases for investigation and possible prosecution, but has not yet prepared arrest warrants. The delay indicates an ongoing effort to identify individuals with the greatest responsibility for the crimes, identified by factors such as the scale, nature, and impact of the crimes. The Prosecutor's task is complicated by the ongoing violence and the lack of cooperation from the Government of Sudan, whose continued intransigence promises to further delay investigation of crimes and ultimately prevent the apprehension of perpetrators.

## EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

### JUDGES AND PROSECUTORS APPOINTED

On May 7, 2006, by Royal Decree NS/RKT/0506/214, King Norodom Sihamoni appointed 17 national and 12 international judges and prosecutors to serve on the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (Extraordinary Chambers). The Cambodian Supreme Council of the Magistracy had previously selected the appointees on May 4, 2006. The government stated that the Supreme Council of the Magistracy had followed proper guidelines for selecting candidates using mandatory criteria in the Establishment Law. These include: evaluating language ability and inter-cultural sensitivity; seeking a balance between candidates' experience and formal education; taking into consideration gender and ethnic rep-

resentation; and assessing candidates' ability to operate in a modern court environment. By position, those appointed are:

**Trial Chamber judges:** Mr. Nil Nonn (Cambodia), Mr. Thou Mony (Cambodia), Mr. Ya Sokhan (Cambodia), Ms. Silvia Cartwright (New Zealand), and Mr. Jean-Marc Lavergne (France). The reserve judges in the Trial Chamber are Mr. You Ottara (Cambodia) and Ms. Claudia Fenz (Austria).

**Supreme Court Chamber judges:** H.E. Kong Srim (Cambodia), Mr. Som Sereyvuth (Cambodia), Mr. Sin Rith (Cambodia), Mr. Ya Narin (Cambodia), Mr. Motoo Noguchi (Japan) Ms. Agnieszka Klonowiecka-Milart (Poland), and Mr. Chandra Nihal Jayasinghe (Sri Lanka). The reserve judges in the Supreme Court Chamber are Mr. Mong Monichariya (Cambodia) and Mr. Martin Karopkin (USA).

**Co-investigating judges:** Mr. You Bun Leng (Cambodia), Marcel Lemonde (France). The reserve co-investigating judges are Mr. Thong Ol (Cambodia) and an international judge (to be announced).

**Co-prosecutors:** Ms. Chea Leang (Cambodia) and Mr. Robert Petit (Canada). Reserve co-prosecutors are H.E. Chuon Sun Leng (Cambodia) and Mr. Paul Coffey (USA).

**Pre-Trial Chamber judges:** H.E. Prak Kimsan (Cambodia), H.E. Ney Thol (Cambodia), Mr. Hout Vuthy (Cambodia), Mr. Rowan Downing (Australia), and Ms. Katinka Lahuis (Netherlands). The reserve judge in the Pre-Trial Chamber is Mr. Pen Pichsaly (Cambodia).

The Cambodian and international judges and prosecutors were sworn in during a ceremony at Phnom Penh's Silver Pagoda in the royal palace on July 3. Trial chamber judge Sylvia Cartwright and reserve co-prosecutor Paul Coffey were reportedly unable to attend the event. Reserve judges Claudia Fenz and Martin Karopkin will only take an oath if they are called into duty from reserve status.

During a week-long workshop in July, the judges agreed to adopt internal regulations to supplement Cambodian procedure, to guide the work of the Chambers, and to ensure compliance with international standards of due process and justice. The judges also established a Rules Committee to draft proposed

internal regulations, and a Judicial Administration Committee to deal with issues relating to the administration of the Extraordinary Chambers, including the infrastructure of the Chambers, protocol concerns, and physical and human resource needs.

The Extraordinary Chambers officially began its operations on July 10, when Cambodian co-prosecutor Chea Leang and international co-prosecutor Robert Petit (Canada) commenced their formal investigation into crimes falling within the Chamber's jurisdiction. These include: genocide, crimes against humanity, grave breaches of the Geneva Conventions, destruction of cultural property, crimes against internationally protected persons, and various domestic crimes under the 1956 Cambodian Penal Code. On September 4, the two co-investigating judges, Marcel LeMonde (France) and You Bun Leng (Cambodia), started their work in Phnom Penh. They are tasked with questioning suspects and victims, hearing witness testimony, and collecting evidence. Principle Defender Rupert Skilbeck (United Kingdom) has negotiated an informal agreement with Cambodian stakeholders that would allow international defense counsel to fully participate in all proceedings related to the representation of accused, although the methods to ensure that this occurs are subject to further negotiation. Skilbeck will begin his work in October 2006.

While the Extraordinary Chambers is making rapid progress in its efforts to become fully operational, many concerns have yet to be addressed. A memorandum dated October 4, from the Open Society Justice Initiative to the Group of Interested States (GIS) — a coalition of nations assisting the Extraordinary Chambers — highlighted several outstanding issues. These included: supplementing the annual budget, adopting clear rules of procedure, fostering judicial leadership and cooperation, strengthening investigative independence and capacity, and enhancing the Extraordinary Chambers' outreach and victim support.

### DEFENDANT INDICTED FOR WAR CRIMES DIES

On July 21, 2006, Ung Chheun, also known as Ta Mok, died at the age of 80. Ta Mok was a notorious military commander of the Khmer Rouge commonly known as "the butcher." He had been in military detention since March 1999, when the government of Cambodia indicted him for crimes against domestic security and genocide. Since then,

the government renewed his detention order each year in apparent anticipation of his prosecution in the Extraordinary Chambers.

### THE IRAQI HIGH CRIMINAL COURT (FORMERLY THE IRAQI SPECIAL TRIBUNAL)

The trial of Saddam Hussein and six others charged with genocide continued after a three week break between August 23 and September 11. The Iraqi High Criminal Court previously heard testimony from survivors of the “Anfal Campaign” against Iraqi Kurds. Witnesses testified that over 180,000 Kurds died in chemical and other attacks against the Kurdish population in 1987. Hussein and seven others have already been tried for the killing of 148 Kurds in Dujail in 1982. A verdict on the Dujail segment of the trial, originally due in October 2006, was deferred to allow defense lawyers to submit written documents and for the court to review additional evidence.

On September 13 Chief Prosecutor Munqith al-Faroon accused Chief Judge Abdullah al-Amiri of bias in the proceedings and called for him to step down after al-Amiri stated that Hussein was “not a dictator.” Al-Faroon had previously made this request on grounds that al-Amiri was biased towards the defense. Acting on Al-Faroon’s petition, on September 19 the cabinet of the Prime Minister asked the court to remove al-Amiri as Chief Judge. Judge Mohammad al-Khalifa, who previously served as Deputy Chief Judge of the court, was selected as al-Amiri’s replacement. Saddam Hussein, however, refused to recognize al-Khalifa’s authority as Chief Judge, resulting in Hussein’s ejection from the court. Hussein’s defense counsel then walked out in protest and vowed not to return until the government stopped “interfering” in the trial. A previous Chief Judge, Rizgar Muhammad Amin, resigned last January, also citing government interference as a main frustration.

On November 5, 2006, Judge Rauf Abdel Rahman sentenced Saddam Hussein to death by hanging for crimes against humanity. Though Hussein and his co-defendants will be permitted to appeal the convictions, the appeals are unlikely to be successful. *HRB*

*Elizabeth J. Rushing, a J.D. candidate at the Washington College of Law, covers the ICTY and ICTR for the Human Rights Brief.*

*Nick Leddy, a J.D. candidate at the Washington College of Law, wrote the Sylvestre Gacumbitsi v. The Prosecutor summary for the Human Rights Brief.*

*Anne Heindel, Assistant Director of the War Crimes Research Office at the Washington College of Law, edited the Sylvestre Gacumbitsi v. The Prosecutor summary for the Human Rights Brief.*

*Angela Edman, a J.D. candidate at the Washington College of Law, covers the International Criminal Court for the Human Rights Brief.*

*Bjorn Sorenson, a J.D. candidate at the Washington College of Law, covers international criminal issues for the Human Rights Brief.*