

International Criminal Law

INTRODUCTION BY DAVID STOELTING*

The year 2001 saw a dramatic increase in U.S. involvement in international criminal law enforcement, in multilateral enforcement efforts, and the activities of international criminal tribunals. The attacks of September 11 also intensified certain ongoing trends and also brought about new developments, which are summarized below. First, Chad Breckinridge and Elena A. Baylis analyze the most significant events relating to U.S. and multilateral enforcement. Second, Maury D. Shenk, Mary T. Mitchell, and Brian J. Newquist discuss the International Criminal Tribunals for the Former Yugoslavia and Rwanda. Finally, Jennifer Schense describes the progress toward the creation of the International Criminal Court.

I. U.S. and Multilateral Enforcement of International Criminal Law

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Prominent developments in international criminal law enforcement occurred on three levels last year: (1) changes on the multilateral level, including developments with regard to international institutions, international conventions, and regional initiatives; (2) advances in states' bilateral arrangements, including extradition treaties, mutual legal assistance treaties, and other inter-state agreements; and (3) unilateral efforts of the United States at curtailing international criminal conduct.

A. MULTILATERAL AND REGIONAL DEVELOPMENTS

In 2001, the trend toward creation, signature, and ratification of multilateral conventions dealing with international crime continued, with a particular focus on anti-corruption and cybercrime. Perhaps the most significant of these was the Council of Europe's Convention on Cybercrime, which promotes the development of a common body of criminal law re-

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lating to copyright infringement, computer-related fraud, child pornography, and violations of network security.¹ Many of the new multilateral conventions contain agreements on international cooperation in addition to their substantive provisions, such as agreements to extradite, to prosecute, or to cooperate in investigations.²

In the wake of September 11, the United Nations Legal Committee considered, but has not yet approved, a comprehensive convention against terrorism.³ This convention would supplement already existing U.N. conventions concerning various forms of terrorism.⁴ On September 28, 2001, the U.N. Security Council passed a more limited measure, Resolution 1373, which called on states to freeze terrorist assets, prohibit terrorism and support for terrorism, and expand counter terrorism cooperation efforts.⁵ Notably, in an effort to give the resolution binding effect, the Security Council issued it pursuant to its authority under Chapter 7 of the U.N. Charter. Moreover, the Security Council took the unusual step of establishing an oversight committee composed of the members of the Council itself. States must report regularly to the oversight committee on the steps they have taken to implement the resolution.⁶

On the investigative front, the past year also saw developments in Interpol and in its recently established European counterpart, Europol. Interpol is an international investigative body and an association of national police agencies from 179 states. Interpol maintains its own information database and network of experts, facilitates information exchange between states, and issues notices for arrest or for information concerning suspects. These resources enable local and federal law enforcement officials to bypass time-consuming and resource-intensive formal mechanisms in conducting international investigations.⁷ After September 11, Interpol supplemented the work of its Public Order and Terrorism Branch by establishing an "11 September Task Force" specifically devoted to directing information and evidence regarding the September 11th attacks to the FBI.⁸

The European Union (EU) continued the process of activating its regional equivalent to Interpol, Europol.⁹ The EU is also developing Eurojust, an institution designed to promote cooperation between prosecutors and investigative magistrates. Following September 11, the EU announced its intention to accelerate work on both of these initiatives.

At the same time, the European Council's Justice and Home Affairs Council urged the director of Europol to promptly establish informal cooperation with counterparts in the

1. Convention on Cybercrime, *opened for signature* Nov. 23, 2001, *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm> (last visited July 3, 2002).

2. European Convention on Mutual Assistance in Criminal Matters, May 29, 2000, *available at* <http://conventions.coe.int/treaty/en/Treaties/Html/030.htm> (last visited July 3, 2002); Criminal Law Convention on Corruption, Jan. 27, 1999, *available at* http://www.ohr.int/ohr-dept/afd/int-ref-ef/coe-crim-lc/default.asp?content_id=5490 (last visited July 3, 2002).

3. International Convention for the Suppression of the Financing of Terrorism, *opened for signature* Jan. 10, 2000, *available at* http://www.odccp.org/resolution_200-02-25_1.html (last visited July 3, 2002).

4. See United Nations Conventions on Terrorism, *available at* <http://untreaty.un.org/English/Terrorism.asp> (last visited July 3, 2002).

5. U.N. SCOR, 4385th mtg., U.N. Doc. S/RES/1373 (2001).

6. *Id.*

7. See generally ETHAN A. NADELMANN, *COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT* (1993); see also www.interpol.int (last visited July 3, 2002).

8. See Press Release, Interpol, 11 September Task Force at Interpol Headquarters (Sept. 14, 2001), *available at* <http://www.interpol.int/Public/ICPO/PressReleases/PR2001/PR200119.asp> (last visited July 3, 2002).

9. See The European Police Office, Fact Sheet, *available at* <http://www.europol.eu.int/facts/en.htm> (last visited July 3, 2002).

United States. The Council also asked Europol to finalize a formal agreement with U.S. law enforcement officials allowing for the exchange of liaison officers and eventual transmission of personal data.¹⁰ In keeping with the Council's request, on December 11, law enforcement representatives from the United States and Europol entered into a cooperation agreement to promote information exchanges.¹¹

In other European developments, the European Commission has adopted a uniform definition of terrorism comprising a list of offenses designed to threaten one or more countries (or their institutions or populations) and to seriously undermine or destroy their political, economic, or social structures.¹² The EU foreign ministers and U.S. Secretary of State Colin Powell also met and announced an agreement to cooperatively increase aviation security, establish additional law enforcement links, impose financial sanctions, enhance export controls, tighten immigration and visa controls, and share investigative information.¹³

B. BILATERAL AGREEMENTS

On the bilateral level, enforcement efforts and recent developments generally fall into three categories: extradition treaties, multilateral legal assistance treaties, and other less formal cooperative arrangements.

Bilateral extradition treaties have long been the primary formal mechanism for bringing suspects into the United States from abroad, and the United States is currently a party to 106 such agreements.¹⁴ The EU has created a new arrest warrant to replace traditional extradition procedures among the EU nations. Scheduled to take effect in 2004, the European Arrest Warrant will cover thirty-two cross-border crimes.¹⁵

Mutual legal assistance treaties (MLATs) provide a means for prosecutors to obtain evidence efficiently from other states. Where they are in force, MLATs replace the resource-intensive and unwieldy letters rogatory process, which requires use of indirect diplomatic channels to serve compulsory process between states. Instead, an MLAT designates central authorities in each state to respond directly to formal requests for information and evidence, streamlining and facilitating the request process. In the United States, the Department of Justice Office of International Affairs is the central authority designated to issue and respond to requests under MLATs. Unlike extradition treaties, MLATs usually apply to any act that is a criminal offense in the requesting state, although some MLATs provide for only limited assistance for investigation of an act that is not a criminal offense in the responding state.¹⁶

Following September 11, U.S. law enforcement agencies have been somewhat hampered by the small number of MLATs that have been signed and ratified. The United States has

10. *Conclusions Adopted by the Council*, Justice and Home Affairs, SN 3926/6/01 REV 6 (Sept. 20, 2001).

11. Press Release, Europol, USA and Europol join forces in fighting terrorism! (Dec. 11, 2001), available at <http://www.europol.eu.int/news/prold/pr011211.htm> (last visited July 3, 2002).

12. *EU Response to 11th September—European Commission action*, EUR. COMMISSION WKLY. UPDATE, Dec. 7, 2001, available at http://europa.eu.int/comm/external_relations/110901/me01_424.htm (last visited July 3, 2002).

13. *Joint EU-US Ministerial Statement on Combating Terrorism*, INT'L POLITIK, Sept. 20, 2001, available at <http://www.dgap.org/english/tip/tip0104/jseuus200901.html> (last visited July 3, 2002).

14. See 18 U.S.C. § 3181.

15. See James Blitz, *Italy bows to pressure on EU-wide arrest warrant*, FIN. TIMES, Dec. 11, 2001, available at <http://www.ft.com> (last visited July 3, 2002).

16. Nancy E. Guffey-Landers, *Establishing an International Criminal Court: Will It Do Justice?* 20 MD. J. INT'L L. & TRADE 199 (1996); NADELMANN, *supra* note 7.

signed MLATs with thirty-four states, but only nineteen have entered into force to date.¹⁷ The United States does not have a treaty with Germany, for example, and it has very few with countries in and around Central Asia. The only Muslim country with which the United States has an MLAT is Morocco.¹⁸

Notwithstanding their advantages over the letters rogatory process, MLATs are still a relatively time-consuming, resource-intensive way of obtaining evidence. Accordingly, law enforcement agencies in the United States and abroad often prefer to rely on informal mechanisms or agency agreements when they are available and effective. On December 3, 2001, Attorney General John Ashcroft, the Canadian Solicitor General, and the Canadian Minister of Citizenship and Immigration signed a Memorandum of Cooperation in which they agreed to jointly develop certain common border security and immigration systems. The United States and Canada had already established Integrated Border Enforcement Teams at certain locations along the U.S.-Canadian border and had established intelligence sharing and cooperation systems under Project North Star. Under the Memorandum of Cooperation, the two countries will expand on these efforts and work to develop a coordinated immigration control system. The United States will also involve Canadian officials in the U.S. Foreign Terrorist Training Task Force and provide access to the FBI fingerprint database.¹⁹

Probably the most ubiquitous development in the wake of September 11 has been the marked increase in informal cooperation between states in their anti-terrorism efforts. One dramatic example is the CIA's development of an international counter terrorism intelligence coalition, which led to the detention of hundreds of terrorism suspects by foreign intelligence agencies and police, in addition to detentions at the behest of the FBI and other U.S. law enforcement officials.²⁰

C. UNILATERAL EFFORTS

Although there have been substantial developments in the United States' cooperative arrangements with other countries as a result of September 11, perhaps the most striking developments have been in the cooperation between U.S. agencies working on international law enforcement. In January 2001, the U.S. government published a Concept of Operations Plan outlining spheres of authority, lines of command, and coordination between federal and state authorities in case of a terrorist attack.²¹ Following the September 11th attacks, a Financial Review Group including officials from the Department of Justice (DOJ), the FBI, and other agencies such as the Treasury Department was established to investigate the money trail behind the September 11th attacks.²² The FBI Strategic International Opera-

17. See Mutual Legal Assistance in Criminal Matters Treaties (MLATs) and Other Agreements, Circular, available at <http://travel.state.gov/mlat> [hereinafter MLATs]; see also John R. Schmertz, Jr. & Mike Meier, *Treaties of Mutual Legal Assistance in Criminal Matters involve US*, INT'L L. UPDATE, Nov. 2001.

18. See MLATs, *supra* note 17; see also Bruce Zagaris, *US Investigative Requests Produces Wave of Joint Investigations, Arrests, and Other Bilateral Responses*, INT'L ENFORCEMENT L. REP. (Nov. 2001). The United States and Egypt have signed an MLAT, but it is not yet in force.

19. Press Release, Department of Justice, Joint U.S.-Canada Statement on Northern Border Priorities (Dec. 3, 2001), available at http://www.usdoj.gov/opa/pr/2001/December/01_ag_626.htm (last visited July 3, 2002).

20. Bob Woodward, *50 Countries Detain 360 Suspects at CIA's Behest*, WASH. POST, Nov. 22, 2001, at A1.

21. THE UNITED STATES GOVERNMENT, INTERAGENCY DOMESTIC TERRORISM CONCEPT OF OPERATIONS PLAN, available at <http://www.fbi.gov> (last visited July 3, 2002).

22. See Dennis M. Lormel, Cutting Off the Financial Lifeblood of Terrorists, Statement for the Record before the House Committee on Financial Services (Oct. 3, 2001), transcript available at <http://fbi.gov/congress/congress01/lormel100301.htm> (last visited July 3, 2002).

tions Center, which was established to deal with such crisis situations, is now focused almost entirely on the September 11th investigation and is also working closely with the rest of DOJ.²³ The Defense Department is also supplementing the ranks of the U.S. Border Patrol on the U.S.-Canadian border with National Guard soldiers.²⁴

The United States has also acted unilaterally. On September 23, 2001, President George W. Bush issued an Executive Order freezing the property of certain designated terrorists and terrorist financiers and blocking transactions with them. The list of designated individuals and entities now numbers nearly 150 and ranges from entities established in the United States, to individuals active in Somalia, to groups that operate predominantly in Northern Ireland.²⁵

Subsequently, after drafting and debating with unusual urgency, the U.S. Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, better known as the USA PATRIOT Act of 2001.²⁶ The USA PATRIOT Act grants the executive branch and domestic law enforcement agencies sweeping investigative and enforcement authority. It freezes assets, expands surveillance and wiretapping authority, heightens immigration and visa controls, strengthens criminal laws relating to terrorism, and creates new restrictions pertaining to international money laundering and anti-terrorism financing.²⁷

The events of September 11 unquestionably have accelerated developments in international criminal law enforcement. Formal and multilateral enforcement mechanisms, such as treaties and international conventions, have experienced comparatively small and slow changes, in large part because of the systemic difficulty of reaching consensus among disparate international actors. On the other end of the spectrum are unilateral state action and informal agreements among states and law enforcement agencies, where change has arrived swiftly and with sweeping effect.

II. International Criminal Tribunals for the Former Yugoslavia and Rwanda

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The year 2001 marked a watershed year in the history and ongoing development of the International Criminal Tribunal for the former Yugoslavia (ICTY). This past year witnessed the arrest of the former President of Yugoslavia Slobodan Milosevic by officials of the Federal Republic of Yugoslavia and his subsequent transfer to the ICTY—leading in early 2002 to the beginning of trial proceedings against him on charges of genocide, crimes against humanity, and other violations of international law. The charges against Milosevic

23. Press Release, FBI (Jan. 24, 2000), available at <http://fbi.gov/pressrel/pressrel00/alba.htm> (last visited July 3, 2002).

24. Press Release, Department of Justice, Department of Justice Partners with Department of Defense for Northern Border Security (Dec. 2, 2001), available at http://www.usdoj.gov/opa/pr/2001/December/01_ag_623.htm (last visited July 3, 2002).

25. Exec. Order No. 13,224, 66 Fed. Reg. 49,077 (Sept. 25, 2001).

26. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

27. See *id.*

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stem from three different indictments—two for events in Bosnia and Herzegovina and Croatia during the early 1990s, and a third covering the more recent events in Kosovo.²⁸

These events represented by far the most important steps to date toward one of the crucial goals of the ICTY—to hold trials for and pass judgment on the highest-ranking civilian and military leaders under indictment by the ICTY. Milosevic has refused to recognize the legitimacy of the ICTY and its right to try him. As a result, court-appointed *amici curiae* filed a motion to dismiss on his behalf, raising several legal objections to the ICTY proceedings against Milosevic, all of which were rejected by the Trial Chamber.²⁹ Subsequently, the three indictments against him were joined for purposes of holding a single trial, which began on February 12, 2002.³⁰

The ICTY itself has undergone important changes during the past year. Many of the structural and procedural changes to the ICTY that were proposed and/or pending in 2000 have been implemented in 2001, with satisfactory initial results.³¹ Changes took place in two main categories—the addition of *ad litem* judges to the ICTY Trial Chambers and modifications to the Rules of Procedure and Evidence. First, pursuant to U.N. Security Council Resolution 1329 the U.N. General Assembly elected a pool of twenty-seven prospective *ad litem* judges to serve at the ICTY.³² Out of that pool of judges, seven were appointed to serve on individual trials during 2001.³³ These additional judges will allow the Tribunal to expand the number of trials it can conduct at a given time. This is especially important with regards to detainees who are awaiting trial. One judge observed that, “pre-trial detention periods . . . average over two years now that apprehensions have so dramatically increased,” and the situation would not have gotten better “if the Tribunal had not received an infusion of ad litem judges. . . .”³⁴

28. ICTY Status of Cases, *Milosevic Case* (“Kosovo, Croatia and Bosnia”) (Feb. 27, 2002), available at <http://www.un.org/icty/glance/casestatus.htm> (last visited July 3, 2002).

29. Prosecutor v. Milosevic, No. IT-99-37-PT (Nov. 8, 2001), available at <http://www.un.org/icty/Supplement/supp26-e/milosevic.htm> (last visited July 3, 2002). Milosevic alleged, *inter alia*, an illegal foundation of the ICTY because it was created not by the U.N. General Assembly, but by the Security Council; lack of impartiality and/or bias against him so as to deprive him of a fair trial under international human rights standards; and lack of jurisdiction due to head-of-state immunity and/or unlawful transfer from the Federal Republic of Yugoslavia.

30. ICTY, Fact Sheet on ICTY Proceedings, available at <http://www.un.org/icty/glance/procfact-e.htm> (last visited July 3, 2002) [hereinafter ICTY Fact Sheet].

31. For a detailed discussion on the origin and evolution of the structural and procedural changes described above, see Maury D. Shenk et al., *International Criminal Tribunal for the Former Yugoslavia and for Rwanda*, 35 INT’L LAW 622, 622–624 (2001).

32. U.N. SCOR, 4240th mtg., U.N. Doc. S/RES/1329 (2000). For a complete list of the twenty-seven elected judges by name and country of citizenship, see Press Release, International Criminal Tribunal for the Former Yugoslavia, Pool of 27 Ad Litem Judges Elected by UN General Assembly (June 13, 2001), available at <http://www.un.org/icty/pressreal/p596-e.htm> (last visited July 3, 2002).

33. The first six were appointed to serve as of September 3, 2001, those being: Ms. Maureen Harding Clark (Ireland); Ms. Fatoumata Diarra (Mali); Ms. Ivana Janu (Czech Republic); Mr. Amarjeet Singh (Singapore); Ms. Chikako Taya (Japan); and Ms. Sharon A. Williams (Canada). Press Release, The First Six Ad-Litem Judges Appointed by United Nations Secretary-General, Kofi Annan (July 31, 2001), available at <http://www.un.org/icty/pressreal/p607-e.htm> (last visited July 3, 2002). The seventh, Mr. Rafael Nieto-Navia (Colombia), was sworn in on December 3, 2001. Press Release, International Criminal Tribunal for the Former Yugoslavia, Judge Nieto-Navia Sworn in as an Ad Litem Judge for the ICTY (Dec. 3, 2001), available at <http://www.un.org/icty/pressreal/p645-e.htm> (last visited July 3, 2002).

34. Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court*, 5 WASH. U. J.L. & POL’Y 87, 97 (2001).

Second, a number of fundamental amendments and additions to the ICTY's Rules of Evidence and Procedure that were designed to expedite procedures were implemented in 2001.³⁵ Major changes to these rules included amendments to existing rules, as well as new rules. For example, new rule 92 *bis* provides procedures for conditional admission of written statements and transcripts from other ICTY trials into evidence before a Trial Chamber, and statements from witnesses too ill to testify or deceased by the time of trial.³⁶

Another important change was the amendment of rule 65 *ter*, which implemented a new, streamlined system of pre-trial case management. This new system provides senior legal officers with greater responsibility in assisting the pre-trial judge and parties in case preparation and management, allowing the trial judges to concentrate more of their time on legal issues. Finally, rules 73 *bis* and 73 *ter* were amended to give trial judges the ability to control the use and presentation of evidence. Judges can now set limits on both the number of witnesses the parties may call and the amount of time the parties may be allowed to present their evidence. With regards to these changes as a whole, ICTY President Jorda stated his belief that "use of *ad litem* judges in conjunction with other reforms . . . will allow the Tribunal to complete its mandate much sooner than expected."³⁷

Six new permanent judges were sworn in, including Professor Theodor Meron of the United States. Eight sitting judges were re-elected to serve for a second term.³⁸ Judge Claude Jorda was re-elected to continue his service as ICTY President, while Judge Shahabuddeen was newly elected to serve as Vice-President. Judge Mohamed Bennouna left the Tribunal on March 1, 2001, to take up duties at the diplomatic service of the Kingdom of Morocco, necessitating the appointment of His Excellency Mohamed El Habib Fassi Fihri to replace Judge Bennouna for the remainder of the judicial term. Finally, Mr. Henry Hans Holthuis was newly appointed as Registrar of the ICTY and began his term of service in January of 2001.

35. Article 15 of the ICTY Statute provides authority to the Tribunal's judges to adopt and amend its Rules of Procedure and Evidence. Amendments to the ICTY's Rules of Procedure and Evidence discussed here were made during regular plenary sessions and one extraordinary session of the ICTY judges during 2000–2001. *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, 56th Sess., Agenda Item, at 61, U.N. Doc. A/56/352–S/2001/865 (2001). While the ICTY instituted wide-ranging amendments to its Rules of Procedure and Evidence affecting other substantive issues, only those implemented to speed the Tribunal's work are addressed here.

36. The purpose of the new rule is "to facilitate the admission by way of written statement of peripheral or background evidence in order to expedite proceedings while protecting the rights of the accused. . ." *Id.* at 12.

37. Press Release, International Criminal Tribunal for the Former Yugoslavia, Second Diplomatic Information Seminar Held at the ICTY (Mar. 23, 2001), available at <http://www.un.org/icty/pressreal/p580-e.htm> (last visited July 3, 2002).

38. Press Release, International Criminal Tribunal for the Former Yugoslavia, The Fourteen Elected Judges Will Take Up Office in November, available at <http://www.un.org/icty/pressreal/p577-e.htm> (last visited Mar. 15, 2001). Permanent ICTY Judges are elected by the U.N. General Assembly to serve for a four-year term. The Third Judicial Term commenced on November 17, 2001, with the following fourteen judges serving: Mr. Carmel A. Agius (Malta); Mr. Mohamed Amin El Abbassi Elmahdi (Egypt); Mr. David Hunt (Australia) (re-elected); Mr. Claude Jorda (France) (re-elected); Mr. O-gon Kwon (Republic of Korea); Mr. Liu Daqun (China) (re-elected); Mr. Richard George May (U.K.) (re-elected); Mr. Theodore Meron (United States); Mrs. Florence Ndepele Mwachande Mumba (Zambia) (re-elected); Mr. Alphonsus Martinus Maria Oric (Netherlands); Mr. Fausto Pocar (Italy) (re-elected); Mr. Patrick Lipton Robinson (Jamaica) (re-elected); Mr. Wolfgang Schomburg (Germany); and Mr. Mohamed Shahabuddeen (Guyana) (re-elected).

Since its inception, sixty-seven indictees have appeared in proceedings before the ICTY, while thirty-one indictees have been tried before it.³⁹ Currently, there are eighty outstanding public indictments that have been issued by the ICTY, with thirty of the corresponding indictees still at large. The remaining fifty accused are currently in proceedings before the Tribunal.⁴⁰ Forty-two of those in proceedings are being held in the ICTY detention facilities, while eight have been provisionally released.⁴¹ At present, eighteen of those indicted and held are at the pre-trial stage, eleven accused are currently at trial, one accused is awaiting judgment from the Trial Chamber, while the remaining twenty were tried at the Trial Chamber and have appeals pending.⁴²

During 2001, seven sentencing judgments and five dispositive judgments on appeal were handed down. This is a large increase in the number of trial judgments alone compared with the year before, and attests to the increased workload of the ICTY over the past year.⁴³

In addition to the judgments in the *Kunarac et al.* and *Krstic* cases discussed *infra*, the ICTY Trial Chambers issued judgments in five other cases, involving, *inter alia*, Croatian intervention in the armed conflict;⁴⁴ a former Chief of Police for the municipality of Bosanski Samac who pled guilty to one count of persecution as a crime against humanity as part of a plea bargain agreement with the Prosecutor;⁴⁵ re-sentencing of previously convicted individuals as per an Appeals Chamber judgment;⁴⁶ and crimes against humanity and war crimes committed against non-Serb Bosnians within the Omarska, Keraterm, and Trnopolje detention camps after Serb forces took control of the Prijedor region.⁴⁷

The Appeals Chamber was also very active in 2001. Among other cases decided by it in 2001, it addressed for the first time the permissibility of cumulative convictions on several charges that are based on the same conduct.⁴⁸ The Chamber held that cumulative convictions are "permissible only if each statutory provision involved has a materially distinct element not contained in the other."⁴⁹ It also reversed a 2000 Trial Chamber judgment that

39. ICTY Fact Sheet, *supra* note 30.

40. *Id.*

41. *Id.*

42. *Id.*

43. In 2000, the ICTY issued only two trial judgments. Shenk, *supra* note 31, at 622–24.

44. Prosecutor v. Kordic, No. IT-95-14/2 (Aug. 2, 2001), available at <http://www.un.org/icty/Supplement/supp14-e/kordic.htm> (last visited July 3, 2002).

45. Prosecutor v. Todorovic, No. IT-95-9/1 (July 31, 2001) (accused sentenced to ten years' imprisonment in return for his plea of guilty), available at <http://www.un.org/icty/Supplement/supp26-e/todorovic.htm> (last visited July 3, 2002).

46. Prosecutor v. Mucic, No. IT-96-21 (Oct. 9, 2001), available at <http://www.un.org/icty/Supplement/supp28-e/celebibi.htm> (last visited July 3, 2002).

47. Prosecutor v. Kvočka, No. IT-98-30/1 (Nov. 2, 2001), available at <http://www.un.org/icty/kvocka/trial/judgement/kvo-tj0111102e-1.htm> (last visited July 3, 2002); Prosecutor v. Sikirica, No. IT-95-8 (Nov. 13, 2001), available at <http://www.un.org/icty/sikirica/judgement/sik-ts011113e.htm> (last visited July 3, 2002).

48. Prosecutor v. Delalic, No. IT-96-22 (Feb. 20, 2001), available at <http://www.un.org/icty/celebici/appeal/judgement/cel-aj010220e-1.htm> (last visited July 3, 2002).

49. Press Release, Appeal Judgment in the Celebici Case (Feb. 20, 2001), available at <http://www.un.org/icty/pressreal/564-e.htm> (last visited July 3, 2002).

had found five individuals guilty of crimes against humanity and violations of the laws or customs of war during an attack on the village of Ahmici in Central Bosnia.⁵⁰ Three of the convictions were reversed in their entirety and those of two others were partially reversed, primarily on the fact that the evidentiary basis for the convictions—largely the testimony of a single eyewitness—was inadequate. The decision was also based on the additional finding that some indictments were defective, insofar as they failed to plead the material facts of the Prosecutor's case with the requisite amount of specificity.⁵¹ The judgment represented the first time the Appeals Chamber had overturned convictions from the Trial Chamber.⁵²

The Appeals Chamber also rendered appeals judgments on charges of contempt of court against two defense counsel, upholding an earlier finding of contempt against one counsel while reversing the Trial Chamber's contempt finding against another. The Appeals Chamber upheld on appeal its own earlier finding that Mr. Milan Vujin had "put forward . . . a case which was known to him to be false" with respect to the admission of additional evidence on appeal, and otherwise improperly manipulated witnesses' testimony.⁵³ Mr. Vujin was fined 15,000 Dutch Guilders, and the Registrar of the Tribunal subsequently struck his name from the list of eligible defense counsel.⁵⁴ However, the Appeals Chamber reversed a Trial Chamber finding of contempt against Mr. Anto Nobile in conjunction with an alleged violation of a witness protection order during his representation of General Blaskic in the *Aleksovski* trial.⁵⁵

50. Prosecutor v. Kupreskic, No. IT-95-16 (Jan. 14, 2000), available at <http://www.un.org/kupreskic/trialc2/judgement/kup-tj000114e-1.htm> (last visited July 3, 2002) [hereinafter Kupreskic].

51. Press Release, International Criminal Tribunal for the Former Yugoslavia, Appeals Judgment Rendered in the "Kupreskic & Others" Case (Oct. 23, 2001), available at <http://www.un.org/icty/pressreal/p629-e.htm> (last visited July 3, 2002); Kupreskic, *supra* note 50. The three Kupreskics won complete reversals and the judgment ordered their immediate release from detention. The sentences of Josipovic and Santic were reduced from fifteen and twenty-five to twelve and eighteen years, respectively.

52. Stephen Castle, *War Crimes Court Reverses Convictions of Bosnians*, INDEPENDENT (London), Oct. 24, 2001, available at <http://www.globalpolicy.org/intjustice/tribunals/2001/2410.htm> (last visited July 3, 2002).

53. Press Release, International Criminal Tribunal for the Former Yugoslavia, Milan Vujin, Former Counsel for Dusko Tadic, Found in Contempt of the Tribunal, and Fined 15,000 Dutch Guilders (Jan. 31, 2000), available at <http://www.un.org/icty/pressreal/p467-e.htm> (last visited July 3, 2002); see also Press Release, International Criminal Tribunal for the Former Yugoslavia, The Appeals Chamber Upholds the Conviction of Mr. Vujin for Contempt of Court (Mar. 2, 2001), available at <http://www.un.org/icty/pressreal/p570-e.htm> (last visited July 3, 2002). Mr. Vujin was lead counsel on behalf of Dusko Tadic in Mr. Tadic's appeals against the judgment of May 7, 1997 and sentencing judgment of July 14, 1997. In light of the finding of contempt against Mr. Vujin, Mr. Tadic has filed a request for review of his complete case with the ICTY President. It is unclear if any action will be taken on this request.

54. *Archive for Mr. Milan VUJIN contempt proceedings, Update No. 177*, at <http://www.un.org/icty/news/Vujin/vujin-cd.htm> (last visited July 3, 2002). The Appeals Chamber judgment against Mr. Vujin directed the Registrar to "consider" striking or suspending him from that list (in either case forbidding him to practice before the tribunal) and report his conduct "to the professional body to which he belongs."

55. Press Release, International Criminal Tribunal for the Former Yugoslavia, Mr. Anto Nobile Cleared of Contempt in the Aleksovski Case (May 30, 2001), available at <http://www.un.org/icty/pressreal/p595-e.htm> (last visited July 3, 2002) (discussed further below).

A. FIRST CONVICTIONS FOR RAPE AND ENSLAVEMENT AS CRIMES AGAINST HUMANITY AND FOR GENOCIDE

During 2001, the ICTY Trial Chambers issued the first convictions for rape and enslavement as crimes against humanity.⁵⁶ The acts on which the judgment was based happened in the municipality of Foca, where Bosnian Serb forces were found to have engaged in a campaign of ethnic cleansing against the resident Bosnian Muslim population. As part of that campaign, the Trial Chamber held that rape was “used by members of the Bosnian Serb armed forces as an instrument of terror.” The Court also found that the defendants had furthered that campaign by willfully engaging in “systematic rape” and through the institution and use of so-called “rape camps” where female Muslims were held for that purpose.⁵⁷ Though all the accused were of “low rank,” the court stated that, “lawless opportunists should expect no mercy, no matter how low their position in the chain of command may be.”⁵⁸ The defendants Kunarac, Kovac, and Vukovic were sentenced to twenty-eight, twenty, and twelve years, respectively, for their crimes.

The ICTY also convicted its first defendant for the crime of genocide in *The Prosecutor v. Radislav Krstic*.⁵⁹ The accused, General Radislav Krstic, was a deputy commander and later the commander of the “Drina Corps,” a military unit within the army of the Republika Srpska. It was the Drina Corps, along with other elements of the Serbian military, which overran and took control of the then U.N.-designated “safe area” of Srebrenica in early July of 1995. The Court found General Krstic guilty of genocide after hearing extensive evidence of mass executions of Bosnian Muslim men of fighting age following the occupation by Serbian forces, as well as other atrocities surrounding the capture of Srebrenica, and sentenced him to forty-six years imprisonment.⁶⁰

In 2001, controversy over the International Criminal Tribunal for Rwanda (ICTR)'s inner workings often detracted from its ongoing mission. In February, the United Nations Office of Internal Oversight Services (OIOS) issued a report, which alleged that fee-splitting between defense counsel and clients was occurring at the Tribunal.⁶¹ Former defense counsel for accused before the ICTR and ICTY admitted to fee-splitting with the accused, while

56. *Prosecutor v. Kunarac*, No. IT-96-23 & IT-23/1 (22 Feb. 2001), available at <http://www.un.org/icty/foca/trialc2/judgement/kun-tj010222e-1.htm> (last visited July 3, 2002).

57. Press Release, International Criminal Tribunal for the Former Yugoslavia, Judgment of Trial Chamber II in the Kunarac, Kovac and Vukovic Case (Feb. 22, 2001), available at <http://www.un.org/icty/pressreal/p566-e.htm> (last visited July 3, 2002).

58. *See id.*

59. *Prosecutor v. Krstic*, No. IT-98-33-T (Aug. 2, 2001), available at <http://www.un.org/icty/krstic/TrialC11/judgement/kra-tj010802e-1.htm> (last visited July 3, 2002).

60. The Chamber heard one hundred and twenty-eight witnesses and admitted more than eleven hundred exhibits during the course of the trial. Press Release, International Criminal Tribunal for the Former Yugoslavia, Radislav Krstic Becomes the First Person to be Convicted of Genocide at the ICTY and is sentenced to 46 Years Imprisonment (Aug. 2, 2001), available at <http://www.un.org/icty/pressreal/p609-e.htm> (last visited July 3, 2002).

61. Press Release, Adama Dieng for the International Criminal Tribunal for Rwanda, Statement by the Registrar: Some Issues Relating To the Defence of Accused Persons, ICTR/INFO-9-3-02.EN (June 13, 2001), available at <http://ictcr.org/wwwroot/ENGLISH/PRESSREL/2001/9-3-02.htm> (last visited July 3, 2002). It was also established that on occasion relatives and friends of defendants had been hired to work for defense counsel. *See id.*

others had given gifts and indirect support to relatives of the accused.⁶² In June, the Registrar of the Tribunal announced reforms related to these charges,⁶³ and in October proposed an amendment to the Code of Conduct of Defence Counsel.⁶⁴

In May, the ICTR faced public embarrassment when a suspect in the 1994 genocide was arrested while working as a defense investigator. Though employed by defense counsel, such investigators are paid by the Court, and are subject to background checks. Simeon Nshamihigo is alleged to have been an organizer of the genocide, and was being sought by prosecutors during his work as a defense investigator under an assumed name.⁶⁵ In June, the Registrar of the Tribunal announced reforms in screening of investigators.⁶⁶ In December, a second defense investigator was arrested and charged with genocide.⁶⁷

Also in May, seven prosecutors complained to the U.N. Secretary-General that their contracts had not been renewed because of racism. Prosecutor Carla del Ponte responded that those who had been let go were not “suited as prosecutors” and that the job losses were part of a general reorganization of the ICTR, in face of complaints about the slow pace of work.⁶⁸

In June, the International Crisis Group issued a report reviewing the ICTR’s first seven years of existence and concluding that the ICTR has failed in its mandate.⁶⁹ The Group criticized the ICTR for slow justice and inefficiency and on having failed to contribute to national reconciliation in Rwanda.⁷⁰ The Group did, however, recognize as laudatory the ICTR’s role in providing “indisputable” recognition of the genocide that occurred, and for “politically neutralizing” the “Hutu Power” movement.⁷¹

The end of October brought charges in the media that a panel of ICTR trial court judges had laughed at a rape victim during her testimony.⁷² The ICTR responded publicly to the

62. *Id.*

63. Press Release, Adama Dieng for the International Criminal Tribunal for Rwanda, Statement by the Registrar: Allegations of Fee Splitting between a Detainee of the ICTR and his Defence Counsel, ICTR/INFO-9-3-06.EN (Oct. 29, 2001), available at <http://www.ictr.org/wwwroot/ENGLISH/PRESSREL/2001/9-3-06.htm> (last visited July 3, 2002). This followed an investigation by the registrar into allegations of fee splitting in the case of Prosecutor v. Nzirorera. This investigation was spurred when the accused, Joseph Nzirorera, sought to have defence counsel removed from his case—only to have the lawyer allege the true reason for the motion was a refusal to split fees. *See id.*

64. Press Release, International Criminal Tribunal for Rwanda, Defence Investigator Arrested, ICTR/INFO-9-2-266.EN (May 21, 2001), available at <http://www.ictr.org/wwwroot/ENGLISH/PRESSREL/2001/266.htm> (last visited July 3, 2002); Chris McGreal, *Rwanda Genocide Suspect Arrested While Working Inside UN Tribunal*, GUARDIAN (London), May 21, 2001, available at <http://www.globalpolicy.org/wldCourt/tribunal/2001/052ictr.htm> (last visited Jan. 21, 2002).

65. TOMRIC News Agency, *International Tribunal to Curb Abuse of Legal Aid Regime* (June 18, 2001), available at <http://www.globalpolicy.org/intljustice/tribunals/2001/0618rwnd.htm> (last visited Jan. 21, 2002).

66. Mary Kumani, *ICTR Arrests Another Defense Investigator on Genocide Charges*, INTERNEWS (Dec. 21, 2001), available at http://www.internews.org/activities/ICTR_reports/ICTRnewsDec01.html (last visited Jan. 23, 2002).

67. *Racism Controversy at UN Rwanda Tribunal*, AFROL NEWS, May 17, 2001, available at <http://www.globalpolicy.org/wldCourt/tribunal/2001/05racism.htm> (last visited Jan. 21, 2002).

68. International Crisis Group, *International Criminal Tribunal for Rwanda: Justice Delayed*, 1-3 (June 7, 2001).

69. *See id.* at 3-12, 23-28.

70. *See id.* at 7-8.

71. *UN Judges Laugh at Rape Victim*, MONITOR (Kampala), Dec. 3, 2001, available at <http://www.globalpolicy.org/intljustice/tribunals/2001/0512rwa.htm> (last visited Jan. 21, 2002).

72. Statement of Judge Pillay, President of the Tribunal, 3 ICTR BULLETIN 2 (Feb. 2002) (detailing results of examination of the records of the trial).

charges, releasing a statement by the President of the Tribunal, Judge Pillay, defending the demeanor of the judges and calling the charges a “mischaracterization.”⁷³

The year was not without progress, however. The “Butare trial” of six defendants, the largest trial conducted so far by the ICTR, began.⁷⁴ In September, the ICTR and ICTY agreed to cooperate on a range of issues, a move that should result in increased efficiency of proceedings in both Courts.⁷⁵ Throughout the year, a large number of genocide suspects were arrested by cooperating nations to face charges before the Tribunal.⁷⁶

B. STATUS OF PROCEEDINGS

As of the end of 2001, the ICTR had indicted more than seventy individuals.⁷⁷ Fifty-two of the accused were in the custody of the ICTR, while four others arrested in 2001 were detained by other states.⁷⁸ One individual had been acquitted, and conditionally released pending appeal by the Office of the Prosecutor.⁷⁹ The ICTR has convicted eight individuals, and the Appeals Chamber has confirmed six of the convictions. Two appeals are still pending.⁸⁰ At the end of the year, thirty-one of the accused were in pre-trial stages, seventeen were at trial in seven proceedings, and two accused were involved in appeals.⁸¹ In December of 2001, six convicted persons were transferred to Mali to serve out their sentences.⁸²

In April, two new judges were elected to the ICTR—Judge Arlette Ramaroson (Madagascar) and Judge Winston Churchill Matanzima (Lesotho).⁸³ Shortly thereafter, Judge La-

73. *Rwandan Woman Charged With Rape and Genocide*, TORONTO STAR, June 13, 2001, available at <http://www.globalpolicy.org/intjustice/tribunals/2001/0613rwnd.htm> (last visited Jan. 21, 2002).

74. Sukhdev Chhatbar, *Rwanda Genocide Tribunal and Ex-Yugoslavia War Tribunal Agree to Cooperate on Judicial Matters*, INTERNEWS, Sept. 20, 2001, available at http://www.internews.org/activities/ICTR_reports/ICTRnewsSep01.html (last visited Jan. 23, 2002).

75. The Belgian government cooperated in the arrest and transfer of Emmanuel Ndingabazizi, former Minister of Finance, and Protas Zikiranyirazo, a businessman. Belgium also arrested Joseph Nzabirinda, a youth organizer, in December. Aloys Simba, a former Lieutenant Colonel, was arrested in Senegal at the end of November. Paul Bisengimana, a former bourgmestre, was arrested in Mali. Tanzania arrested and transferred to the ICTR Sylvestre Gacumbitsi and Jean Mpambara, former bourgmestres, as well as Simeon Nchamihigo, a former Deputy Prosecutor. Kenya arrested and transferred Francois Karera, former Prefet of Kigali, and Samuel Musabyimana, Anglican Bishop of Shyogwe. Switzerland arrested and transferred Emmanuel Rukundo, a former military chaplain. Simon Bikindi, a musician, was arrested in the Netherlands. See International Criminal Tribunal for Rwanda, *ICTR Detainees—Status on 7 February 2002*, available at <http://www.ictr.org/wwwroot/ENGLISH/factsheets/detainee.htm> (last visited Feb. 10, 2002) [hereinafter *ICTR Detainees*].

76. *Vatican Puzzled by Verdict Against Rwandan Nuns*, AFROL NEWS (June 20, 2001), available at http://www.afrol.com/News2001/rwa010_nuns_genocide.htm (last visited Jan. 23, 2002).

77. *ICTR Detainees*, *supra* note 75.

78. *See id.*

79. International Criminal Tribunal for Rwanda, *Achievements of the ICTR*, at <http://www.ictr.org/ENGLISH/geninfo/achieve.htm> (last visited Mar. 2, 2002).

80. *ICTR Detainees*, *supra* note 75. *Trials in Progress*, 2 ICTR BULLETIN 9 (Dec. 2001).

81. *See id.*

82. There are sixteen judges on the ICTR bench. Nine judges serve in three Trial Chambers, made up of three judges each. Seven judges sit in the Appeals Chamber, with five at a time serving on each panel for appeal or review. See *Report of the International Criminal Tribunal for the Prosecution of Person Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States between 1 January and 31 December 1994: Note by the Secretary General*, U.N. GAOR, 56th Sess., Agenda Item 62, at 3, U.N. Doc. A/56/351-S/2001/863 (2001) [hereinafter *Sixth Report*].

83. *See id.*

ity Kama, Presiding Judge of Trial Chamber II passed away, necessitating the appointment of Judge Andresia Vaz (Senegal) to serve out Judge Kama's term.⁸⁴ On November 23, 2001, the ICTR Appeals Chamber, which is common to both the ICTR and ICTY, underwent changes in membership following the election of new judges to the ICTY.⁸⁵ A new Registrar, Adama Dieng (Senegal) began service on March 1st of the year.⁸⁶

The Trial Chambers of the ICTR concluded only one case during 2001. On June 7, 2001, Trial Chamber I acquitted Ignace Bagilishema of all charges against him, and ordered his conditional release pending the Prosecutor's appeal against the judgment.⁸⁷ Bagilishema, a former *bourgmestre* (mayor) of the town of Mabanza, had been accused on seven counts of genocide, crimes against humanity, and serious violations of common Article 3 of the Geneva Conventions.⁸⁸ The ICTR Trial Chambers commenced three trials involving ten defendants in 2001, including the "Butare" trial, which involves the first female accused of genocide in an international Court.⁸⁹

The ICTR concluded four appeals from trial Court verdicts and sentences during 2001. On June 2, 2001, the Appeals Chamber rejected all grounds of appeal raised by Jean-Paul Akayesu, confirming the verdict and sentence of the trial court.⁹⁰ On the same date, the Appeals Chamber also confirmed the sentences and verdicts in the cases of Clement Kayishema and Obed Ruzindana.⁹¹ The court also found inadmissible an appeal by the prosecutor in the Ruzindana case, as it was untimely filed.⁹² On November 16, 2001, the Appeals Chamber issued its ruling on the appeal of Alfred Musema, confirming his sentence to life

84. The Appeals Chamber is now composed of Presiding Judge Claude Jorda (France), Judge Mohammed Shahabuddeen (Guyana), Judge David Hunt (Australia), Judge Mehmet Guney (Turkey), Judge Asoka de Zoysa Gunawardana (Sri Lanka), Judge Fausto Pocar (Italy) and Judge Theodor Meron (United States). *New Composition of ICTR Appeals Chamber*, 2 ICTR BULLETIN 5 (Dec. 2001).

85. *See id.* Mr. Dieng previously held posts as Registrar of the Supreme Court of Senegal, and Secretary-General of the International Commission of Jurists, as well as serving as the United Nations Independent Expert for Haiti in 1995. Press Release, International Criminal Tribunal for Rwanda, New Registrar Appointed to the Tribunal, ICTR/INFO-9-2-257.EN (Jan. 29, 2001), available at <http://www.pict-pcti.org/news/archive/months%202001/january/ICTR.01.29.registrar.html> (last visited July 3, 2002).

86. *Prosecutor v. Bagilishema*, No. ICTR-95-I-T (June 7, 2001), available at <http://www.ictr.org/wwwroot/ENGLISH/cases/Bagilishema/judgement> (last visited July 3, 2002).

87. Press Release, International Criminal Tribunal for Rwanda, Tribunal Acquits Bagilishema, ICTR/INFO-9-2-271.EN (June 7, 2001), available at <http://www.ictr.org/wwwroot/ENGLISH/PRESSREL/2001/271.htm> (last visited July 3, 2002).

88. The trial of Juvenal Kajelijeli, No. ICTR-98-44-AT, began on March 31, 2001, the trial of Jean-de-Dieu Kamuhanda, No. ICTR-99-54-T, on April 17, 2001, the "Butare" trial (Nyiramashuko, Ntahobali, Nteziyayo, Nsabimana, Ndayambaje, and Kanyabashi), No. ICTR-08-21-T et al. on June 12, 2001, and the father & son trial of Elizaphan and Gerard Ntakirutimana on September 18, 2001. *Trials in Progress*, *supra* note 80. Pauline Nyiramashuko, former Minister of Family and Women's Affairs has been charged with offenses of genocide and rape, as one of the six "Butare" defendants. She, her son, and four others are charged with genocide and other crimes related to massacres of ethnic Tutsis in the town of Butare. She is also charged with "inciting ethnic Hutus to use rape as a systematic weapon against minority ethnic Tutsis during the genocide." *Rwandan Woman Charged With Rape and Genocide*, *supra* note 73.

89. *Prosecutor v. Akayesu*, No. ICTR-96-4-A (June 1, 2001).

90. *Le Procureur v. Kayishema*, No. ICTR-95-1-A (June 1, 2001), available at <http://www.ictr.org/wwwroot/FRENCH/cases/KayishemaRuzindana/arret> (last visited July 3, 2002).

91. *See id.* at Part II, ¶¶ 47-48. "En l'espèce, le Procureur a négligé de déposer son mémoire d'appelant à temps en deux occasions. . . L'appel du Procureur est irrecevable dans sa totalité."

92. *Alfred Musema v. Prosecutor*, No. ICTR-96-13-A (Nov. 16, 2001), available at <http://www.ictr.org/wwwroot/FRENCH/casesw/Musema/judgement/arret> (last visited July 3, 2002); *see also Musema's Genocide Conviction Upheld*, 2 ICTR BULLETIN 2 (Dec. 2001).

imprisonment, and his conviction for genocide and extermination as a crime against humanity. The Appeals Chamber did, however, quash his conviction for rape as a crime against humanity based upon new evidence.⁹³

Perhaps the most startling decision from the ICTR this year was Trial Chamber I's ruling in the *Bagilishema* case—issuing the first acquittal of an accused by the ICTR. Bagilishema, a *bourgmestre* for fourteen years, had been accused of genocide and other crimes. Among the acts he was accused of in the period centered on April 1994 were: holding meetings to encourage the murder of Tutsis, personally attacking and killing refugee Tutsis, ordering Interahamwe militia to dig mass graves, and directing massacres of refugees.⁹⁴ Bagilishema had offered a defense that he had been attempting to restore harmony and law and order during the period, and that he had acted to prevent killings.⁹⁵

After deliberating for almost eight months,⁹⁶ the Trial Chamber ruled in a lengthy opinion that the prosecutor had failed to meet its burden of proof beyond a reasonable doubt. The court determined that the prosecution had failed to establish that Bagilishema had “individual criminal responsibility” for the massacres and other crimes of which he was accused. In reaching this conclusion, the court focused in particular on inconsistencies and contradictions in the testimony of witnesses,⁹⁷ finding in many cases that the prosecution had not even been able to establish that Bagilishema was present at locations or meetings.⁹⁸

The ICTR's ruling was unanimous on two counts—genocide and serious violations of common Article 3 to the Geneva Conventions.⁹⁹ Judge Güney dissented on the four other counts against Bagilishema, on the basis that he believed there was sufficient evidence to establish individual criminal responsibility for those charges.¹⁰⁰ The Prosecutor has lodged an appeal in the case.¹⁰¹ In the interim, the ICTR allowed the conditional release of Bagilishema.¹⁰²

93. Bagilishema, *supra* note 86.

94. See, e.g., *id.* ¶¶ 255, 266.

95. Sixth Report, *supra* note 82, at 4.

96. Steven Edwardsni, *UN Team Blasted Over Rwandan Verdict*, NATIONAL POST, June 8, 2001, available at <http://www.globalpolicy.org/intljustice/tribunals/2001/0608rwd2.htm> (last visited Jan. 21, 2002).

97. See, e.g., Bagilishema, *supra* note 86, ¶ 555. “The fact that the Prosecution has not been able to demonstrate that the Accused was at the Stadium at some point during the period 13 to 17 April 1994 means that the Accused cannot bear *direct* responsibility for the detention of the refugees or for the conditions of their detention.”

98. See *id.* at Chapter VI: Verdict. Judge Gunawardana, while joining the majority on all counts, issued a separate opinion. This opinion discussed Bagilishema's defense that he lacked resources to prevent crimes in Mabanza, but that he had made best efforts to do so with the resources available. Judge Gunawardana would find for Bagilishema on this defense.

99. See *id.* at Separate and Dissenting Opinion of Judge Mehmet Güney.

100. Mary Kimani, *Tribunal Prosecutor Files Notice of Appeal*, INTERNEWS, July 16, 2001, available at <http://www.globalpolicy.org/intljustice/tribunals/2001/0717rwnd.htm> (last visited Jan. 21, 2002). Prosecutor Carla del Ponte has expressed confidence that she will win the appeal, blaming the loss of the case on presentation. The lead prosecutor in the case was among prosecutors released from service by Ms. del Ponte in 2001. Edwardsni, *supra* note 96.

101. Press Release, International Criminal Tribunal for Rwanda, Tribunal Releases Bagilishema on Conditions, ICTR/INFO-9-2-272.EN (June 8, 2001), available at <http://www.ictcr.org/wwwroot/ENGLISH/PRESSREL/2001/272.htm>. Bagilishema was required to: (1) provide the names of two guarantors, (2) inform the tribunal of his address and report monthly to local police, and (3) not travel outside his country of residence without written permission. France eventually agreed to take in Bagilishema.

102. *Focus on Recent Decisions and Orders of the Tribunal: Contempt*, 1 ICTR BULLETIN 4 (Oct. 2001).

In the *Butare* case, the ICTR faced its first allegation of contempt related to alleged tampering with prosecution witnesses. Two days after the case opened,¹⁰³ the Prosecutor filed a motion charging that defense investigators for defendant Joseph Kanyabashi had presented themselves as ICTR investigators to local Rwandan officials to gain access to information related to protected witnesses. The Prosecutor also alleged that defense investigators had tried to discourage prosecution witnesses from testifying in the case.¹⁰⁴ Prosecutors sought to have the court order an investigation into these allegations.¹⁰⁵

The court examined the motion using a strict *prima facie* standard, and determined that there was insufficient evidence to launch an investigation. The court dismissed the motion as it was based (1) solely on hearsay evidence, (2) was not precise in its allegations, and (3) was made more doubtful because of a withdrawn allegation. The court, in fact, issued a warning to the prosecutor under Rule 46, for reckless and improper conduct in disclosing the identity of Defense personnel.¹⁰⁶

The matter remains unresolved, however. The motion was refiled in July, with additional witness statements, which the Prosecutor contended provided "*prima facie*" proof of the alleged contempt of the Tribunal,¹⁰⁷ but no resolution has yet been issued by the Court.

In the *Akayesu* case, the Appeals Chamber ruled that while indigent defendants before the ICTR had the right to counsel, they did not have an absolute right to counsel of their choice. The Prosecutor also lodged an appeal in the *Akayesu* case, however, it was an appeal aimed at resolution of issues of "general significance to the Tribunal's jurisprudence." Issues raised included: whether there is a "public agent or government representative test" to be met to hold persons responsible for serious violations of Common Article 3 of the Geneva Conventions; whether Article 3 of the ICTR Statute requires proof of "discriminatory intent" for crimes against humanity; and whether "incitement" need be "direct and public" in nature for purposes of article 6(1) of the ICTR Statute.¹⁰⁸ Akayesu objected to the admissibility of the appeal, arguing that none of the errors raised fell into the parameters of Article 24 of the Statute, which limits jurisdiction on appeal to (1) errors of law invalidating the trial Court decision or (2) errors of fact causing "miscarriage of justice."¹⁰⁹

Following prior decisions by the ICTY, the Court held that it was appropriate for it to hear appeal on issues of "general significance" to its jurisprudence.¹¹⁰ The Appellate Chamber found that it had to go beyond the ICTY's jurisprudence, however, as it was being asked by the prosecution to consider *solely* questions of general significance.¹¹¹ The Appellate Chamber decided that it would consider only questions of general significance which met the test of being issues: (1) "of interest to legal practice of the Tribunal" and (2) having

103. See Kate Gehring, *Defense Investigators Posed as ICTR Reps, Prosecutor Claims*, INTERNEWS, June 18, 2001, available at <http://www.globalpolicy.org/intljustice/tribunals/2001/0615rwnd.htm> (last visited Jan. 21, 2002).

104. *Focus on Recent Decisions and Orders of the Tribunal: Contempt*, *supra* note 102, at 4.

105. Prosecutor v. Nyiramasuhuko, No. ICTR-97-21-T et al. (July 10, 2001), available at <http://www.ictr.org/wwwroot/ENGLISH/cases/Nyiramasuhuko/decisions/100701.htm> (last visited July 3, 2002).

106. *Id.*

107. Prosecutor v. Bagosora, No. ICTR-98-41-1, Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses ¶ 23 (Dec. 5, 2001), available at <http://www.ictr.org/wwwroot/ENGLISH/cases/Bagosora/decisions/051202c.htm> (last visited July 3, 2002).

108. *Id.* ¶ 16.

109. See Akayesu, *supra* note 89, ¶¶ 18-19.

110. *Id.* ¶¶ 20-24.

111. See *id.* ¶ 24.

a “nexus with the case at hand.”¹¹² The Appellate Chamber found that both prongs of the test were met by all three of the arguments raised by prosecution in this case. All three “relate to the legal definition of certain offences covered in the Statute,” satisfying the first element, and all had a “nexus with the case” as all concerned “constituent elements adopted by the Trial Chamber in its interpretation” of Statute Articles.¹¹³

III. The International Criminal Court

JENNIFER SCHENSE*

The year 2001 was a pivotal year for the International Criminal Court. Ratifications of the Rome Statute jumped from twenty-seven at the start of 2001 to forty-eight by the end of the year, just twelve short of the sixty required for the Rome Statute to enter into force.¹¹⁴ Of those twenty-one that ratified in 2001, six are in Latin America, two in Africa, one in the Pacific, five in Eastern Europe, and seven in Western Europe.¹¹⁵

It is increasingly clear that 2002 will be the year that the Statute enters into force. As of March 7, 2002, the Rome Statute has been ratified by fifty-five States.¹¹⁶ Based on developments in countries around the world, the sixtieth ratification is expected in the spring of 2002, and that the Statute will enter into force during the summer of 2002.¹¹⁷

112. See *id.* ¶ 27. Substantively, the Appellate Chamber resolved the prosecutor's issues by finding (1) there is no “public agent or government representative test” for holding persons responsible for Serious Violations of Common Article 3 of the Geneva Conventions, (2) Article 3 of the ICTR Statute does not require “discriminatory intent” for crimes against humanity, and (3) that “incitement” in Article 6(1) of the ICTR Statute did not need to be “direct and public.” See *id.* ¶¶ 425–483.

113. For information regarding earlier developments at the ICTY and ICTR, see Douglas Stringer, *International Criminal Tribunal for the Former Yugoslavia*, 31 INT'L LAW. 611 (1997); Monroe Leigh & Maury D. Shenk, *International Criminal Tribunal for the Former Yugoslavia and Rwanda*, 32 INT'L LAW. 509 (1998); Maury D. Shenk et al., *International Criminal Tribunal for the Former Yugoslavia and for Rwanda*, 33 INT'L LAW. 549 (1999); Maury D. Shenk et al., *International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 34 INT'L LAW. 683 (2000); Shenk, *supra* note 31.

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114. The most updated list of ratifications is available on the Coalition's Web site at <http://www.iccnw.org/rome/html/ratify.html>.

115. The countries that ratified in 2001 are Argentina, Dominica, Paraguay, Costa Rica, Antigua and Barbuda, Peru, Andorra, Croatia, Denmark, Sweden, the Netherlands, Yugoslavia, Liechtenstein, the United Kingdom, Switzerland, Poland, Hungary, Slovenia, Nigeria, the Central African Republic, and Nauru. See the Coalition's Web site for the full list of ratifications and signatures of the Rome Statute.

116. Since the start of 2002, Benin, Estonia, Portugal, Ecuador, Mauritius, the Former Yugoslav Republic of Macedonia and Cyprus have ratified the Rome Statute. See the Coalition's Web site for the full list of ratifications and signatures of the Rome Statute.

117. Article 126 of the Rome Statute sets forth the conditions under which the Rome Statute will enter into force, namely:

1. This Statute shall enter into force on the first day of the month after the 60th day following the

Approximately another forty countries are in various stages of ratifying the Rome Statute, with as many as twenty of those ratifications on a path to ratify in 2002. The more States that have ratified the Statute, the greater the Court's reach will be and therefore the greater its potential contribution to the maintenance of international peace and security. Implementation has proven to be a greater challenge even than ratification; only a handful of the fifty-five States that have ratified the Statute have also adopted the comprehensive legislation that will allow them to cooperate with the Court and to prosecute these crimes in their own Courts.

Governments from all regions of the world have been active in promoting greater awareness of the ICC and in fostering intergovernmental dialogue about how the ICC will work, based on the development of national implementing legislation and thereby through State cooperation with the Court.¹¹⁸ These governments have worked in cooperation with international organizations and non-governmental organizations to organize seminars and intergovernmental meetings all around the world for this purpose. This cooperation, in pursuit of a common goal, has been described as "the new diplomacy."¹¹⁹

A. PROGRESS AT THE PREPARATORY COMMISSION

The Preparatory Commission for the International Criminal Court (PrepCom) completed two sessions, from February 26–March 9 and from September 24–October 5. The second session, in particular, was a landmark session because the PrepCom was able to adopt four new draft instruments for inclusion in its final report to the Assembly of States Parties,¹²⁰ and also adopted a roadmap, setting out additional mechanisms to facilitate establishment of the Court.¹²¹

At the February 26–March 9 session the Preparatory Commission began for the first time to consider issues relevant to the practical set-up of the Court in The Hague. Work on these issues was guided by the PrepCom bureau's contact point for general issues, Zsolt Hetesy (Hungary). By the end of this session, the PrepCom recognized, based on consul-

date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Essentially, this means that the Statute will enter into force between two and three months after the deposit of the sixtieth ratification, depending on the specific day of the month of the deposit.

118. The Canadian government, in particular, has undertaken an exemplary campaign to promote entry into force of the Rome Statute. More information on that campaign can be found on the website of the Canadian Department of Foreign Affairs and International Trade, at www.dfait-maeci.gc.ca.

119. The term "new diplomacy" is one also credited to Lloyd Axworthy, who used it in a statement in support of the International Criminal Court in April 1998 during a conference at Harvard University. *The New Diplomacy: The UN, the International Criminal Court and the Human Security Agenda*, Notes for an Address by the Honourable Lloyd Axworthy, Minister of Foreign Affairs, to a conference on U.N. Reform at the Kennedy School, Harvard University (Apr. 25, 1998).

120. The draft instruments adopted are the relationship agreement between the ICC and the United Nations, the agreement on privileges and immunities, the financial regulations, and the rules of procedure of the Assembly of States Parties. These draft agreements are available on the U.N. Web site at www.un.org/law/icc.

121. Road map leading to the early establishment of the International Criminal Court, PCNICC/2001/L.2 (Sept. 26, 2001). The roadmap is also available on the U.N. Web site at www.un.org/law/icc.

tations conducted by Hetesy that the PrepCom would likely have to take up responsibilities not explicitly mentioned in the Final Act of the Rome Diplomatic Conference. Many of these new responsibilities pertain to practical questions of the establishment and early stages of the operation of the Court, as well as the first meetings of the Assembly of States Parties. Additional sessions of the PrepCom were scheduled to accommodate these new responsibilities. In addition, the bureau began work on a masterwork plan with tentative timetable, to be circulated in the September 24–October 5, 2001 session.

The bureau continued to meet, to clarify these additional areas of work for the PrepCom. The result, introduced and adopted at the September 24–October 5, 2001 session, was the roadmap.¹²² The roadmap sets forth three new areas of work, including new working groups to address documents for the first Assembly of States Parties meetings and the finances of the Court; focal points to oversee the development of draft provisional internal rules for the non-judicial administration of the Court; and the creation of a subcommittee to liaise between the bureau and the host State, the Netherlands.

The Preparatory Commission has already undertaken a number of constructive steps to fulfill the requirements of the roadmap. Focal points have been identified and have begun work on the provisional internal rules, in preparation for an intersessional meeting that will be held from March 11–15, 2002 in The Hague, the Netherlands. In addition, the subcommittee of the bureau has met twice with the host State and with other experts to assess progress achieved thus far toward actual establishment of the Court. The subcommittee continues to explore ways and means to bring the necessary experts into the process, to ensure that the Court is established on the strongest possible foundation, taking into account the experiences of similar institutions. The Preparatory Commission is poised to conclude its work this year; it will meet for two more sessions, scheduled for April 8–19 and July 1–12.¹²³

B. CONFERENCE ON ICC DEFENSE BAR

In early December, a conference was convened in Paris to consider the establishment of a criminal bar for the ICC. The conference was attended by approximately 300 delegates, including numerous representatives of bar associations and other international organizations, as well as individual defense lawyers. A primary reason for the conference is that while the ICC Statute creates an Office of the Prosecution and a Victims and Witnesses Unit, there is no ICC institution to represent the interests of defendants.

The conference managed to take only very preliminary steps towards creation of an ICC defense bar. There was significant disagreement among those who want to establish a bar controlled by individual defense lawyers, and those who want to create an association to represent the interests of national bar associations at the ICC. There was also disagreement regarding whether the bar should include only representatives of defendants, or also representatives of victims. Nevertheless, sufficient agreement on the general concept of an ICC bar was achieved to make it likely that there will be significant progress in creating an ICC bar during 2002. A further conference on this issue is expected in summer 2002.

122. *Id.*

123. The sessions of the Preparatory Commission are set forth in the most recent General Assembly resolution on the subject, G.A. Res. A/56/85.

C. PROGRESS IN ACTUAL ESTABLISHMENT OF THE COURT IN THE HAGUE

The Netherlands has begun preparations for the temporary premises and the permanent site of the Court. The government of the Netherlands is working intensively, in conjunction with the bureau of the Preparatory Commission, to ensure that the physical premises of the Court are prepared in a timely fashion, so that the senior elected officials of the Court may take up their work as soon as is practicable after their elections.

In relation to actual establishment of the Court, the foreign minister of the Netherlands, Jozias van Aartsen, addressed the Preparatory Commission in a special plenary held on September 25, setting forth some additional details about the temporary premises of the Court, and about the future site of the permanent facilities of the Court.¹²⁴ In particular, the host State has assembled a national task force of approximately ten members to plan for the Court. The host State has also secured temporary premises to host the Court while permanent facilities are under development. It is anticipated that the permanent facilities will be completed by 2007. The host State has also pledged to spend more than thirty-three million Euro on the temporary premises, including approximately ten million on the interior layout and design. Finally, the host State has pledged to contribute financially to the initial meetings of the Assembly of States Parties and its bureau, and to fully finance the inaugural meeting of the Court.

Van Aartsen also emphasized the need for close cooperation among the Bureau of the Preparatory Commission, the host State, other ratifying States, experts and non-governmental organizations, to ensure that the Court is successfully established. This final stage of preparatory work, as with the global ratification and implementation campaign, will require the same "new diplomacy" approach to succeed, and it is anticipated that the Court in its nascent year will require this same unique combination of forces to thrive.

124. Statement by the Minister of Foreign Affairs of the Kingdom of the Netherlands, Jozias J. van Aartsen, during the eighth session of the Preparatory Commission for the International Criminal Court, New York, September 25, 2001. This statement is available on the Coalition's Web site at www.iccnw.org and on the Web site of the Netherlands Ministry of Foreign Affairs at www.minbuza.nl/english.

