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Updates from the International Criminal Courts

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UPDATES FROM THE INTERNATIONAL CRIMINAL COURTS

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

CROATIA

On December 7, 2005, Spanish authorities in the Canary Islands arrested Ante Gotovina, a former Croatian general charged with crimes against humanity. Specifically, Gotovina was charged with deportation and forced displacement, persecution (plunder, destruction of property, deportation/forced displacement, and unlawful killing), and other inhumane acts (inhumane, humiliating, and degrading treatment), as well as violations of the laws or customs of war (murder, plunder, and wanton destruction of cities, towns, or villages). Gotovina, who had managed to evade justice since the International Criminal Tribunal for the Former Yugoslavia (ICTY) issued an indictment against him in 2001, led Operation Storm during the war. The goal of Operation Storm was to establish Croatian authority over the Krajina region of Croatia and, according to the indictment, forcibly and permanently remove the Serb population from that region. ICTY authorities allege that when Croatian forces attacked and took control of towns, they persecuted the local Serb population and destroyed their property. Gotovina allegedly encouraged others, including Croatian civilians, to perpetrate these crimes.

Croatia has recently made cooperating with the Tribunal a priority, particularly regarding Gotovina, because the European Union conditioned accession negotiations on full cooperation with the ICTY. The United States also insisted that Croatia could not join NATO until Gotovina was in The Hague. In June 2005 ICTY Prosecutor Carla Del Ponte told the Security Council that Croatia's full cooperation meant either that Gotovina would be brought to The Hague or that Croatia would provide actionable intelligence on his whereabouts. In her December address to the Security Council, Del Ponte opined that the use of international incentives could serve as a model to overcome the difficulties in working with Bosnia and Herzegovina and Serbia and Montenegro.

LOOKING AHEAD

On December 15, 2005, Judge Fausto Pocar, the newly elected President of the ICTY, addressed the UN Security Council for the first time. Three weeks earlier, on November 30, 2005, Pocar had submitted the fourth report of the President of the Tribunal, as required by Security Council resolution 1534. This report detailed the measures the ICTY has taken and the challenges it faces with regard to the goals of its completion strategy. One of the internal measures taken was the formation of the Working Group on Speeding up Trials and the Working Group on Speeding up Appeals. Recommendations of the working groups have led to physical improvements in courtrooms, which allow for trials with multiple defendants and procedures that have resulted in greater efficiency in the appeals process. The Tribunal has also implemented an e-Court system, which integrates all case-related documents into a central electronic database, thereby eliminating the need for extraneous paper filings, and expediting appeal proceedings.

Pocar also confirmed that ICTY trials will extend into 2009. The caseload at the ICTY has continued to grow; 21 indictees were apprehended in 2005 alone. To deal with the large volume of cases, the Tribunal has begun the joinder of cases against some defendants. Presently 45 accused individuals await trial in 18 cases, and only 6 out of a total of 161 indictees remain at large. Pocar emphasized that it is crucial that the Tribunal not close its doors until all fugitives have been arrested and tried.

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

LAURENT SEMANZA V. PROSECUTOR, CASE NO. ICTR-97-20-A

On May 20, 2005, the ICTR Appeals Chamber delivered its judgment in the case of *Laurent Semanza v. Prosecutor*. Laurent Semanza had served as bourgmestre of Bicumbi commune for 20 years until 1993 and was subsequently selected to represent the Mouvement Républicain National et Démocratique (MRND) in the National Assembly envisioned

by the Arusha Accords. The Trial Chamber sentenced him to 25 years imprisonment in May 2003 after finding him guilty of complicity in genocide, aiding and abetting the crime against humanity of extermination, and instigating the crimes against humanity of rape, torture, and murder for his participation in attacks committed in Bicumbi and Gikoro communes in April 1994, including massacres at Musha Church and Mwulire Hill.

The Appeals Chamber rejected all of Semanza's grounds of appeal, including those relating to an apprehension of bias of the Trial Chamber; defects in the indictment; violations of the right to counsel; errors with respect to his alibi defense, the taking of judicial notice, and the evaluation of evidence; cumulative charging and convictions; and errors in sentencing.

The Appeals Chamber also rejected the Prosecution's contention that the Trial Chamber had incorrectly required proof of a superior-subordinate relationship to establish the mode of responsibility of "ordering." Instead, the Appeals Chamber found that, in seeking evidence of the implied existence of such a relationship, the Trial Chamber had acted in accord with the views of the International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber in *Kordic and Cerkez*. The Appeals Chamber agreed with the ICTY that, under this approach, to prove the actus reus of "ordering," "It is sufficient that there is proof of some position of authority on the part of the accused that would compel another person to commit a crime in following the accused's order." Although the Appeals Chamber held that the Trial Chamber had applied the appropriate legal standard, it nevertheless found that the evidence did not support the Trial Chamber's determination that Semanza lacked any form of authority over the attackers at Musha Church. The Trial Chamber's finding that refugees at the church had been executed "on the directions" of Semanza meant that "no reasonable trier of fact could hold otherwise than that the attackers to whom the Appellant gave directions regarded him as speaking with authority." This authority established a real superior-subordinate relationship, even if "informal or of a purely temporary nature." As a consequence the Appeals Chamber reversed Semanza's conviction for

aiding and abetting genocide and extermination as a crime against humanity at Musha Church and entered a conviction for ordering these crimes as a principal perpetrator.

The Prosecution also challenged the Trial Chamber's finding that, although Semanza was responsible for serious violations of Common Article 3 to the Geneva Conventions and Additional Protocol II, a conviction could not be entered for these crimes because they were based on the same conduct as his convictions for complicity in genocide and crimes against humanity. The Appeals Chamber noted that it is settled law that cumulative convictions are permissible "if each statutory provision involved has a materially distinct element not contained in the other." As held by the *Rutaganda* Appeals Chamber, war crimes have a materially distinct element from genocide and crimes against humanity, "namely the existence of a nexus between the alleged crimes and the armed conflict." Likewise, convictions for genocide and crimes against humanity require proof of materially distinct elements: the specific intent to commit genocide for the former and the existence of a widespread or systematic attack against a civilian population for the latter. Because the Trial Chamber's failure to enter a conviction for war crimes thus constituted legal error, the Appeals Chamber entered a conviction on this basis for aiding and abetting the murders at Mwilire Hill, instigating the rape and torture of Victim A and the murder of Victim B, committing the torture and intentional murder of Victim C, and due to its previous finding as to Semanza's individual responsibility for the attacks at the church, ordering the murders at Musha Church.

Because Semanza was responsible for ordering and not merely aiding and abetting the killings at Musha Church, the Appeals Chamber determined that, in accordance with the prior practice of the Tribunals of imposing higher sentences for co-perpetration, Semanza's sentence should be increased. Although it agreed with the Prosecutor that convictions for perpetrating genocide had generally resulted in life sentences, it determined that "the length of Appellant's sentence should be mitigated by violations of his pre-trial rights," suggesting that the fact that Semanza was neither promptly notified of the charges against him nor provided with an opportunity to challenge the lawfulness of his detention while awaiting transfer to the Tribunal made the imposition of a life sentence inappropriate. Instead, the Appeals Chamber increased his sentence by ten years to a total of 35 years

imprisonment, minus credit for time served and the six-month reduction ordered by the Trial Chamber as a consequence of his unlawful detention. In their separate opinion, Judges Shahabuddeen and Güney opined that the new sentence for genocide was "lenient," stating that, but for the six-month reduction, Semanza's participation in genocide would have justified a life sentence.

PROSECUTOR V. ELIZAPHAN NTAKIRUTIMANA AND GÉRARD NTAKIRUTIMANA, CASE NOS. ICTR-96-10-A AND ICTR-96-17-A

On December 13, 2004, the Appeals Chamber of the ICTR issued its judgment in *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*. The case involved the conviction of a father and son, Elizaphan and Gérard Ntakirutimana, and stemmed from their participation in attacks at the Mugonero complex on April 16, 2004, and in the Bisesero area of Kibuye Prefecture over the following several months. Under the Mugonero indictment, the Trial Chamber found Elizaphan, a pastor at the Seventh Day Adventist Church at the Mugonero complex, guilty of aiding and abetting genocide for conveying attackers to the site and encouraging them to kill Tutsi refugees. It found Gérard, who worked as a doctor at the complex, guilty of genocide and murder as a crime against humanity for his direct participation in the killing. Under the Bisesero indictment, Elizaphan was found guilty of aiding and abetting genocide for leading attackers into the countryside and pointing out Tutsi refugees and for ordering the removal of a church's roof to facilitate the attacks. Gérard was found guilty of genocide and murder as a crime against humanity for personally killing at least three victims during the attacks.

The Appeals Chamber recalled that it must defer to the Trial Chamber's factual findings unless "no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous." It will overturn an erroneous finding only if it resulted in a miscarriage of justice. Regarding errors of law, the party seeking reversal must explain how an error invalidates the Trial Chamber's decision. Finding several errors of fact and law, the Appeals Chamber quashed one of each of the Appellants' convictions, entered several new convictions, and affirmed their sentences.

The only ground of appeal by Gérard and Elizaphan that the Appeals Chamber accepted

was their allegation that the Mugonero and Bisesero indictments failed to plead material facts, and that in some instances this failure had prejudiced their right to a fair trial. Citing the judgment of the ICTY in the *Kupreskic* case, the Appeals Chamber noted that the Prosecution has an obligation to disclose "the material facts underpinning an indictment" and can cure a faulty indictment by providing defendants with clear, consistent, and timely information prior to the start of the trial. The Appeals Chamber then dismissed several of the Trial Chamber's factual findings due to the prejudice caused to the Appellants by the Prosecution's failure to meet this obligation. As a consequence, the Appeals Chamber reversed Elizaphan's conviction for aiding and abetting genocide under the Mugonero indictment, which was based on the unpled allegation that he had conveyed attackers to the Mugonero site. In addition, due to the Prosecution's failure to plead specific material facts regarding Gérard's responsibility for shooting particular individuals, the Chamber reversed his conviction for murder as a crime against humanity under the Bisesero indictment. Although the Appeals Chamber determined that the remaining findings also did not support Gérard's conviction for personally committing genocide under the Bisesero indictment, as discussed below, it nevertheless found that he could be held responsible as an aider and abetter to genocide for his participation in the attacks.

Also due to the Prosecution's failure to provide proper notice, the Appeals Chamber rejected its argument that the Trial Chamber should have considered whether the accused were guilty of genocide or of extermination as a crime against humanity under a theory of joint criminal enterprise liability (JCE). The Prosecution argued that it was sufficient that the indictment referred generally to the mode of liability of "commission" in Article 6(1) of the Statute and need not "specify the precise mode of liability alleged against the accused in an indictment as long as it makes clear to the accused the nature and cause of the charge against him." The Appeals Chamber recognized that it had been the practice of the Prosecution to plead generally the modes of liability in Article 6(1) but noted that the Prosecution had "long been advised" by the ICTY Appeals Chamber, for example in the *Aleksovski* judgment, that it would be preferable to "indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged." In the present case, because the Prosecution had failed to provide notice

to the Appellants or the Trial Chamber in either the indictment or the Pre-Trial Brief that they were charged with JCE liability, the Appeals Chamber found that the Prosecution had not established error.

Both Elizaphan and the Prosecution appealed the Trial Chamber's findings regarding the Appellants' responsibility for aiding and abetting genocide. Elizaphan argued that the ICTR Statute did not include aiding and abetting as a mode of liability for genocide, and that insufficient evidence existed to prove he had the requisite mens rea for a genocide conviction. Noting that both the ICTR and the ICTY have found that the mode of complicity in genocide in their Statutes encompasses "aiding and abetting," and finding sufficient evidence in the record that Elizaphan knew of the genocidal intent of the principle perpetrators, the Appeals Chamber dismissed his appeal on this ground. The Prosecution, on the other hand, argued that the Trial Chamber erred in convicting Gérard of genocide only on the basis of acts that he personally committed. The Appeals Chamber agreed and found that he had aided and abetted genocide under both the Mugonero and the Bisesero indictments by procuring gendarmes and ammunition for the attacks. It noted that "a finding by the Trial Chamber that the accused had the intent to commit genocide and did so by killing and causing harm to members of the group does not per se prevent a finding that he also knowingly aided and abetted other perpetrators of genocide." Consequently, it entered an additional conviction for genocide under the Mugonero indictment and affirmed Gérard's conviction for genocide under the Bisesero indictment, limiting his responsibility to that of an aider and abetter due to the Chamber's dismissal of several factual findings relating to his personal participation in the killing.

The Prosecution also appealed the Trial Chamber's acquittal of the Appellants on the charge of extermination as a crime against humanity, arguing that the Trial Chamber erred by requiring that "victims be named or described persons." The Appeals Chamber agreed that this is not an element of the crime and concluded that if the Trial Chamber had applied the correct legal standard based on its findings supporting the Appellants' substantial contribution to mass killing it would have convicted Elizaphan for aiding and abetting extermination under the Bisesero indictment and Gérard for aiding and abetting this crime under both the Mugonero and the Bisesero indictments.

After determining that its revision of the verdict did not affect the underlying basis of the sentences imposed by the Trial Chamber, the Appeals Chamber upheld the original sentences of ten years imprisonment for Elizaphan Ntakirutimana and 25 years imprisonment for Gérard Ntakirutimana.

**PROSECUTOR V. MIKAELI MUHIMANA,
CASE NO. ICTR-95-1B-T**

On April 28, 2005, the ICTR Trial Chamber delivered its judgment in the case of *Prosecutor v. Mikaeli Muhimana*. Muhimana, the former conseiller of Gishyita Secteur, was indicted on four counts — genocide, complicity in genocide, murder as a crime against humanity, and rape as a crime against humanity — based on his participation in events in the Bisesero area and Gishyita Commune between April and June 1994. The Trial Chamber found Muhimana guilty on all counts with the exception of complicity in genocide, which was charged in the alternative to genocide, and imposed three concurrent life sentences.

In finding Muhimana guilty of genocide, the Chamber noted his participation in several attacks on Tutsi civilians during which he shot at Tutsi refugees, raped Tutsi women, and threw a grenade into Mubuga Church, where Tutsi refugees were gathered. The Chamber then determined from his deeds, utterances, and the sheer scale of the attacks, during which a significant number of Tutsis died or were seriously injured, that Muhimana had committed these acts with the specific intent to destroy the Tutsi group in whole or in part. For example, he directed Hutu refugees to exit the church before he threw the grenade and specifically referred to the Tutsi ethnicity of his victims during his crimes.

Muhimana was found guilty of the crimes against humanity of murder and rape for committing these acts with the knowledge that they formed part of a discriminatory, widespread, and systematic attack against Tutsi civilians. The Trial Chamber determined that he had intentionally killed when he threw the grenade at Tutsi refugees gathered in the church (causing the death of one man), when he instigated the murder of two Tutsi sisters, and when he participated in the decapitation of a Tutsi businessman. Additionally, he was found to have murdered Pascasie Mukaremera, a pregnant woman, by disemboweling her after telling a gathering of fellow Hutu assailants that he

wanted to see what a fetus looked like in its mother's womb. After opening her stomach with his machete, Muhimana removed the baby, who cried for some time before dying, while other assailants cut off Mukaremera's arms and stuck sharpened sticks into them. Although the Prosecution originally charged Muhimana with instructing another man to murder Pascasie Mukaremera, the evidence showed that Muhimana was responsible for her murder. The Trial Chamber found that Muhimana suffered no prejudice as a result of this defect in the indictment because he received timely, clear, and consistent information describing the factual basis of the crime of which he was accused. Moreover, the defense raised no objection to the error.

The Trial Chamber determined that Muhimana raped numerous women and a girl during April and May 1994. Two of his victims were forced out of his house while still naked, and those present were invited to see what naked Tutsi girls looked like. He apologized to one of his rape victims, an underage girl whom he attacked in a hospital basement, after being informed that she was not a Tutsi. By his presence during rapes committed by others, Muhimana was also found to have aided and abetted several rapes. Moreover, he was found to have encouraged the rape of a victim who was attacked multiple times over two days by allowing her to be taken away by a man who said he wanted to "smell the body of a Tutsi woman."

The Chamber adopted the *Akayesu* Trial Chamber's definition of rape — a "physical invasion of a sexual nature, committed on a person under circumstances which are coercive" — and noted that this definition was intended to include "acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual." It then found that the *Akayesu* definition "encompasses" the elements of rape set out by the *Kunarac* Trial Chamber and endorsed by the *Kunarac* Appeals Chamber, that is, "the sexual penetration, however slight ... of the vagina or anus of the victim by the penis of the perpetrator or any other object ... or of the mouth of the victim ... where such sexual penetration occurs without the consent of the victim." The Trial Chamber noted that the Trial Chambers in the *Semanza*, *Kajelijeli*, and *Kamuhanda* cases appeared to have focused "only on the physical elements of the act of rape" as expressed in *Kunarac* and not on *Akayesu's* "conceptual" definition. The Trial Chamber rejected this

approach and took the view that the two definitions “are not incompatible or substantially different in their application” because *Kunarac* merely refined *Akayesu* by “articulat[ing] the parameters of what would constitute a physical invasion of a sexual nature amounting to rape.” Nevertheless, the Trial Chamber rejected without further elaboration the Prosecution’s contention that Muhimana’s disembowelment of Pascasie Mukaremera “by cutting her open with a machete from her breasts to her vagina” could be considered rape, determining that although this act “interfere[d] with the sexual organs ... it [did] not constitute a physical invasion of a sexual nature.”

The Trial Chamber found no mitigating factors but noted numerous aggravating factors in Muhimana’s case. These included his position of influence in Gishyita Commune; his participation in attacks against persons who had sought refuge in places of sanctuary and safety, such as churches and a hospital; his rape of an underage girl; his intentionally degrading and humiliating treatment of his female victims by, for example, raping them in the presence of other people and parading them naked in public; and his particularly violent and cruel conduct toward his victims. Further, the Chamber found that his “savage” mutilation of Pascasie Mukaremera “deserve[d] condemnation in the strongest possible terms and constitute[d] a highly aggravating factor.” These factors and the gravity of the crimes of which he was convicted persuaded the Chamber to sentence Muhimana to the maximum sentence allowed on each guilty count: three life sentences of imprisonment.

INTERNATIONAL CRIMINAL COURT

UN COOPERATION

The President of the International Criminal Court (ICC), Judge Philippe Kirsch, addressed the United Nations General Assembly on November 8, 2005. He discussed the first report of the ICC to the UN and stressed that cooperation between the ICC and the UN is especially important now that the Court is operational.

On November 23, 2005, the General Assembly passed a resolution indicating its political support for the ICC and its work. The resolution highlights the importance of the relationship agreement, which outlines cooperation between the UN and the ICC. The resolution also serves to remind states of

the need to cooperate with the ICC in carrying out its work. The resolution was adopted by consensus with only the United States expressing a reservation.

The Security Council is in the process of drafting a new Resolution on the Protection of Civilians in Armed Conflict. This draft aims to address developments that have taken place since the Security Council passed a resolution on the same topic in 2000. Instrumental in determining the nature of these changes was the Secretary-General’s Report on the Protection of Civilians in Armed Conflict, issued on November 28, 2005. The report notes that today’s armed conflicts are more often low-intensity and fought with small arms. This results in fewer major military engagements and increased targeting of civilians.

During the open debates, most members expressed overwhelming support for the inclusion of a provision stating the importance of the ICC in deterring crimes against civilians, but the United States is working to delete all references to the ICC in the draft resolution. The United States was successful earlier in the year in eliminating all language associated with the ICC and impunity from the final Outcome Document of the United Nations World Summit.

FOURTH SESSION OF THE ASSEMBLY OF STATES PARTIES

The Assembly of States Parties to the Rome Statute (ASP) held its fourth session in The Hague from November 28 - December 3, 2005. During the session the ASP adopted regulations for the Victims Trust Fund (VTF), which channels money to victims of the most serious crimes, including child soldiers, rape victims, and those suffering the loss of property and livelihood. These regulations allow the VTF Board of Directors to “provide physical or psychological rehabilitation or material support for the benefit of victims and their families.” The ASP also decided that non-state contributors can earmark contributions to the VTF for up to one-third of their donation, even though individual states cannot do so. Additionally, the ASP adopted a resolution mandating that the next three sessions of the ASP will alternate between New York and The Hague. These future sessions of the ASP will last at least eight days. Accordingly, a liaison office will be established for the ICC at the UN Headquarters in New York.

During the fourth session, many states emphasized the importance of the Court’s outreach efforts. Although the ASP approved only five of the eight Field Office positions requested in the proposed budget for 2006 prepared by the Court’s Registrar, it allowed for greater flexibility in transferring funds between programs to respond to potential gaps in outreach and communications that may arise in the upcoming year due to the ongoing investigations in the Democratic Republic of Congo, Darfur, Sudan, and Northern Uganda.

From January 26 – 27, 2006, during a resumed session in New York, six ICC judges were elected, as well as six members of the Committee on Budget and Finance. Five of the six judges that were elected had already served three-year terms with the Court. The election of a new female judge has shifted the gender balance of the ICC bench to eight women and ten men, which is a noteworthy achievement in international criminal tribunals. An additional change is that judges will now serve nine-year terms.

UPDATE ON DARFUR

On December 19, 2005, ICC Prosecutor Luis Moreno-Ocampo submitted his second report to update the Security Council on implementation of the Security Council’s Resolution 1593, which referred the case of Darfur to the ICC.

In June Moreno-Ocampo announced that there were reasonable grounds to initiate an investigation into the situation in Darfur. This determination allowed the Office of the Prosecutor (OTP) to exercise its full investigative powers. Investigations by the OTP are conducted in two phases. The OTP is currently in the first phase, which includes collecting information relating to the crimes alleged to have taken place in Darfur, as well as the groups and individuals allegedly responsible. In the second phase of the investigation, the Prosecutor will select specific cases for prosecution in accordance with article 53(2) of the Rome Statute. One of the challenges facing the OTP in its investigation is that the documentary and oral evidence is in a variety of languages and dialects. To ensure success the OTP must prioritize identifying impartial and effective interpretation and translation services.

Witness protection remains a major concern at the ICC. Because the security situation in Darfur remains volatile, all investiga-

tive activities have taken place outside the region. Investigations will not take place within Darfur until an effective system for the protection of ICC victims and witnesses is implemented. Despite this limitation significant progress has been made. Witnesses to the crimes under investigation have been identified in 17 countries, more than 100 potential witnesses have been screened, and a number of formal statements have been taken.

The ICC's latest report to the Security Council reiterates that the ICC, as a body, is complementary to national criminal courts. Its report stated that the ICC is a court of last resort that will only intervene where a state is either unwilling or unable to carry out a fair investigation or prosecution. Accordingly, the OTP is also gathering and assessing information related to the mechanisms established by the Sudanese authorities in response to the crimes allegedly being committed in Darfur, including Sudan's Special Court for Darfur.

During the past six months, the Special Court has conducted six trials. The defendants were primarily low-ranking members of the armed forces, although some civilians were among them. The ICC prosecutions, conversely, will focus on those bearing greatest responsibility in a selected number of criminal incidents. Sudanese officials have agreed to organize a visit for representatives of the OTP to come to Sudan by the end of February 2006 to assess the proceedings of the Special Courts and to conduct interviews to obtain information on the activities of all the parties to the conflict in Darfur. According to the Prosecutor, the continued cooperation of the Sudanese government will be essential to understanding the situation in Darfur and the context in which crimes were allegedly committed.

THE EXTRAORDINARY CHAMBERS OF THE COURTS OF CAMBODIA FOR THE PROSECUTION OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA

ON NOVEMBER 25, 2005, the government of Cambodia appointed Sean Visoth as the Director of the Office of Administration of the Extraordinary Chambers of the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (Extraordinary Chambers) and confirmed Michelle Lee as Deputy Director of the Office of Administration, which followed her appointment by the United Nations in October 2005.

Two days earlier the United Nations had announced its list of candidates for international co-investigating judges, international co-prosecutors, and international judges for the Extraordinary Chambers. Candidates for these positions include nominees from Australia, Austria, Egypt, France, Germany, New Zealand, Poland, and Turkey (a nominee from the United States withdrew his name from consideration). There will be two international judges in the Trial Chamber and three in the Supreme Court Chamber. Interviews were held from December 7 - 9, 2005, at the headquarters of the United Nations in New York. It is unclear when the final decisions will be made. Lee and Visoth have stated that they intend to coordinate their announcement of the Cambodian officials named to the Extraordinary Chambers with the U.N.'s final recommendations for international officials.

Although it initially moved slowly, the Extraordinary Chambers has recently made significant progress on many fronts. From December 6 - 16, 2005, Lee led a UN Start-Up Assessment Mission to Cambodia. The mission was comprised of seven members, including the four newly appointed chiefs of Security, Information and Communications Technology, Budget and Finances, and General Services, as well as representatives from UN Headquarters in New York (spokesperson for the mission Anne-Marie Ibanez, from the Department of Political Affairs, and David Hutchinson, from the Office of Legal Affairs). The corresponding Cambodian delegation included members of the Royal Government's Secretariat of the Task Force and representatives from the Ministries of Economy and Finance; Land Management, Urban Planning and Construction; the Ministry of Interior's Extraordinary Chambers Security Commission; and the National Information and Communications Technology Development Authority.

The office of administration is expected to be operational by early 2006. The rest of the year will be spent training judges and prosecutors and making the chambers operational. The Extraordinary Chambers will likely focus their efforts on top Khmer Rouge officials, including Nuon Chea, Khieu Samphan, and Ieng Sary, all of whom currently remain free in Cambodia. Chea and Samphan are eligible for prosecution by the Extraordinary Chambers, but Sary's status remains unclear. He was granted amnesty by Cambodia's King Sihanouk

in 1996, following a death sentence imposed in absentia in 1979 by the People's Revolutionary Court of Phnom Penh, an ad hoc tribunal.

A possible increase in international support provides some reason for optimism. Cambodia has already secured funding for the first year of operations at the Extraordinary Chambers. Although the country's government has stated that it will be unable to come up with \$10.8 million for its share of the costs, Lee and other officers are investigating methods of compensating for this shortfall. India is the only foreign country to contribute to Cambodia's portion of the funding thus far, but Lee has spoken to representatives of Australia, Canada, France, Germany, and Japan about possible contributions. She has also appealed to representatives of the United States and hopes to meet with representatives of Denmark. Cambodia may be able to help cover the shortfall by using an estimated \$6.9 million in leftover aid money deposited by foreign governments into United Nations trust funds for Cambodia in the early 1990s. The use of these funds, however, is conditional upon agreement by the contributors. Another possibility involves the Extraordinary Chambers opening a bank account into which private citizens could make contributions, although Visoth stated that the Chambers will need permission from the Cambodian Ministry of Economy and Finance to open such an account.

Despite these advances, non-governmental organizations and civil society groups remain concerned about the Extraordinary Chambers' progress. For example, the Cambodian government has stated that it will not allow its list of choices for Cambodian members of the tribunal to be published, which was done by the United Nations with regard to international candidates. International commentators fear that this lack of transparency will undermine the public's confidence in the Extraordinary Chambers.

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

On January 15, 2006, an official with the Iraqi tribunal trying Saddam Hussein confirmed that Chief Judge Rizgar Muhammad Amin had submitted his letter of resignation to the Iraqi High Criminal Court (Court). Judge Amin cited govern-

ment interference as his main frustration, although some commentators speculate that recent criticism regarding his lack of control in the courtroom may have contributed to his decision to resign. It was initially expected that Amin's deputy, Saeed al-Hammash, would succeed him, but allegations that al-Hammash had once been a member of the Ba'ath party — which al-Hammash, as a Shiite, denies — resulted in his withdrawal from contention. Instead, Kurdish Justice Rouf Abdel-Rahman was appointed.

These events come after continued personnel upheavals in the trial of Hussein and his co-defendants, which began October 19, 2005. Just 36 hours after proceedings began, Sadoon Janabi, lawyer for co-defendant Awad Hamad Bandar, the former chief judge of Hussein's Revolutionary Court, was kidnapped and killed. On November 8, 2005, gunmen fired on Adel Muhammad al-Zubaidi and Thamer Mahmoud al-Khuzai, two attorneys for co-defendant and former Iraqi Vice President Taha Yassin Ramadan. Al-Zubaidi was killed instantly and Al-Khuzai was injured.

The Court has also faced disruptions by defense lawyers and defendants objecting to the Court's limitations on their defense strategies. When a new session began on November 28, 2005, at least four defense attorneys were absent. During the same session, prominent civil rights lawyer and former U.S. Attorney General Ramsey Clark joined Hussein's defense team. On December 5, 2005, when the trial again resumed, defense lawyers briefly left the courtroom when Judge Amin refused to allow them to question the court's authority as part of their defense strategy. Defense lawyers staged another walkout on January 29, 2006, when Judge Abdel-

Rahman accused them of encouraging defendants to publicly question the court's authority and ejected one lawyer from the courtroom. The judge stated that attorneys who walked out would be unable to return. When four new defense attorneys were appointed, defendants Taha Yassin Ramadan and Awad Hamed al-Bandar objected and exited the courtroom. Hussein was removed after he refused his court-appointed lawyers and shouted "down with traitors."

The proceedings themselves have also proved contentious. In their first court appearance, Hussein and seven co-defendants refused to recognize the Court's authority, although they subsequently pleaded not guilty to charges of killing 149 Shiites in Dujail in 1982 following a failed attempt on Hussein's life. Upon defense counsel's request for a continuance, proceedings were postponed until November 28, 2005. When the trial resumed, it quickly degenerated into a shouting match in which Hussein stood and yelled "long live Iraq" and boasted that he was not afraid of execution. During this session the Court heard its first witness testimony.

During a short session from December 5 - 7, 2005, the first prosecution witnesses to appear in person testified. Hussein disrupted the first two days of the session and boycotted the third. He described his absence as a protest against "an unjust court." Hussein's defense lawyers claimed that he and the other defendants have not been allowed private meetings with their lawyers, and that they have otherwise been denied access to the necessary facilities and evidence to prepare their defense. Proceedings were adjourned until December 21, 2005, to

avoid holding hearings immediately prior to and during the Iraqi parliamentary elections, which took place on December 15, 2005.

The Court was scheduled to resume with the trial on January 24, 2006. Just hours before it was set to begin, however, Chief Investigative Judge Raed Juhi announced that the Court would delay the proceedings for another five days because some of the witnesses scheduled to testify were on pilgrimage to Mecca. Despite the absence of many of the defendants and defense attorneys, the Court heard some witness testimony when the court resumed January 29, 2006. The trial was adjourned until February 1, 2006. *HRB*

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ENDNOTES: Finding Family continued from page 20

Australia refused to provide a pension to the surviving same-sex partner of a war veteran). Generally, the Committee's decisions support the view that the conception of family in international human rights law is narrow. For example, when the Committee decided in favor of Young, it did so without actually considering the existence of family life between the partners.

²⁴ ECHR Protocol No. 12, which went into force in April 2005, adds a general ban on discrimination, but only a minority of states has ratified the protocol to date.

²⁵ *X & Y v. Switzerland*, nos. 7289/75 and 734/76, 9 D&R 57 (1977).

²⁶ *Keegan v. Ireland*, 1994 Eur. Ct. H.R. 18, ¶ 44 (May 26, 1994).

²⁷ The Commission on Human Rights historically screened cases for admissibility before referring them to the Court until the two effectively merged in 1998 under Protocol No. 11 on the restructuring of the ECHR organs. This article distinguishes between the Commission and Court for the sake of accuracy, but the distinction is largely irrelevant for the present discussion.

²⁸ Within this time period, Denmark, Norway, and Sweden passed same-sex

partnership laws, but the Commission took no account of the evolving social conditions.

²⁹ *X & Y v. United Kingdom*, no. 9396/81, 32 D&R 220, at 221-22 (May 3, 1983).

³⁰ *Kerkhoven v. Netherlands*, no. 15666/89, at "The Law" ¶ 1 (May 19, 1992).

³¹ *Salgueiro da Silva Mouta v. Portugal*, 1999 Eur. Ct. H.R. 176 (Dec. 21, 1999).

³² *Karner v. Austria*, 2003 Eur. Ct. H.R. 395, ¶ 33 (July 24, 2003).

³³ *X, Y & Z v. United Kingdom*, 1997 Eur. Ct. H.R. 20, ¶ 35 (Apr. 22, 1997).

³⁴ *Goodwin v. United Kingdom*, 2002 Eur. Ct. H.R. 588 (July 11, 2002).

³⁵ *Tyrer v. United Kingdom*, 1978 Eur. Ct. H.R. 2, ¶ 31 (Apr. 25, 1978).

³⁶ See, e.g., *Rees v. United Kingdom*, 1986 Eur. Ct. H.R. 11, ¶ 49 (Oct. 17, 1986); *Marckx v. Belgium*, 1979 Eur. Ct. H.R. 2 (June 13, 1979).

³⁷ *Goodwin* at ¶ 74.

³⁸ *Id.*