



WWW.ASIL.ORG  
©2009

# INT'L LAW IN BRIEF

DEVELOPMENTS IN INTERNATIONAL LAW, PREPARED BY THE ATTORNEY EDITOR OF INTERNATIONAL LEGAL MATERIALS  
AMERICAN SOCIETY OF INTERNATIONAL LAW

December 4, 2009

**PDF** [Click here to view this issue of ILIB in a printable PDF.](#)

## Resolutions, Declarations, and Other Documents

- Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing

## Judicial and Similar Proceedings

### International Criminal Tribunal for the former Yugoslavia

- Prosecutor v. Dragomir Milošević (ICTY Nov. 12, 2009)

### International Criminal Tribunal for Rwanda

- Zigiranyirazo v. Prosecutor (ICTR Nov. 16, 2009)

### International Criminal Court

- Prosecutor v. Jean-Pierre Bemba Gombo, Appeals Chamber Decision on Interim Release (Dec. 2, 2009)

### Extraordinary Chambers in the Courts of Cambodia

- Decision on Independence of Pre-Trial Judges (Nov. 30, 2009)

### NAFTA/UNCITRAL

- Vito G. Gallo v. Canada, UNCITRAL - Challenge of Arbitrator (NAFTA Oct. 14, 2009)

## Briefly Noted

- WIPO General Assembly Resolution Agenda Item 28 (Sept. 22 – Oct. 1, 2009)

*\*Educational copying is permitted with due acknowledgment*

## Resolutions, Declarations, and Other Documents

### **Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Nov. 25, 2009)**

[Click here](#) for document (approximately 30 pages)

On November 25, 2009, during its governing conference in Rome, the Food and Agriculture Organization of the United Nations (FAO) approved a new treaty aimed at closing fishing ports to ships involved in illegal, unreported, and unregulated (IUU) fishing. Upon entering into force after ratification by twenty-five countries, this treaty will be the “first ever legally binding international treaty focused specifically on this problem. It will also be the only one to enlist so-called ‘non-flag states’ in the fight against IUU fishing, alongside flag states that are primarily responsible for the conduct of vessels flying their flags on the high seas.”

Angola, Brazil, Chile, the European Community, Iceland, Indonesia, Norway, Samoa, Sierra Leone, the United States, and Uruguay, the first FAO members, have already signed the treaty, thus committing themselves “to prevent, deter and eventually eliminate IUU fishing including by taking steps to guard their ports against vessels engaged in IUU fishing, thereby preventing fish from such vessels from entering international markets.”

More specifically, all signatories are obliged to implement the following measures:

- Foreign fishing vessels wishing to dock will be required to request permission from designated ports ahead of time, transmitting information related to their activities and the fish they have on board. This will give authorities an opportunity to spot any red flags in advance.
- Port States will conduct regular inspections of ships according to a common set of standards. Reviews of ship papers, surveys of fishing gear, examining catches, and checking ship records can often reveal if a ship has engaged in IUU fishing.
- They also must ensure that ports are adequately equipped and inspectors properly trained.
- When a vessel is denied access, port states must communicate that information publicly, and national authorities of the country whose flag the vessel is flying must take follow-up action.

While these measures apply only “to foreign fishing vessels not flying the flag of port states,” members can also apply them to their own fishing fleets.

Finally to ensure compliance, all members must monitor the implementation of these measures.

## Judicial and Similar Proceedings

### **International Criminal Tribunal for the former Yugoslavia**

#### **Prosecutor v. Dragomir Milošević (ICTY Nov. 12, 2009)**

[Click here](#) for Appeals Judgment Summary (approximately 9 pages)

The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) issued a judgment in *Prosecutor v. Dragomir Milošević*, partially affirming the former Bosnian Serb army general’s conviction for crimes committed against civilians in Sarajevo during the second half of the 1992–1995 siege. The Appeals Chamber partially reversed the Trial Chamber, which had found Milošević guilty under Article 7(1) of the ICTY Statute “for planning and ordering the crimes of terror, as a violation of the laws or customs of war (count 1), murder and inhumane acts, as crimes against humanity, committed through sniping (counts 2, 3) and shelling (counts 5 and 6).” Both Milošević and the prosecution appealed the Trial Chamber’s judgment: Milošević cited twelve grounds of appeal, and the prosecution cited a sole ground asking that the imposed sentence of thirty-three years be increased to life imprisonment.

In the most interesting part of the judgment, the Appeals Chamber replaced Milošević’s convictions for planning and ordering the crimes of terror under Article 7(1) of the Statute with Article 7(3), for failing to prevent and punish crimes committed by his subordinates. The Appeals Chamber ruled that the evidence cited by the Trial Chamber did not support a finding that Milošević planned and ordered the sniping incidents; however, the

Appeals Chamber ruled that his failure to prevent and punish the crimes was established “beyond reasonable doubt.”

The judgment is also noteworthy in light of the fact that Stanislav Galic, who preceded Milosevic in the place of the commander of the Sarajevo Romanija Corps for the first part of the siege, was sentenced on appeal in November 2006 to life imprisonment.

In addition to substituting his conviction under Article 7(1) with Article 7(3), the Appeals Chamber also reversed Milosevic’s convictions on three shelling incidents during which Milosevic was hospitalized. As a result of these reversals, the Appeals Chamber reduced Milosevic’s prison sentence from thirty-three to twenty-nine years.

## International Criminal Tribunal for Rwanda

### **Zigiranyirazo v. Prosecutor (ICTR Nov. 16, 2009)**

[Click here](#) for document (approximately 42 pages)

The Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) reversed Protais Zigiranyirazo’s convictions for genocide and extermination as a crime against humanity and entered a verdict of acquittal. Zigiranyirazo, a brother-in-law of the late former President of Rwanda, Juvenal Habyarimana, was arrested while traveling to Belgium in 2001 on a fake French passport and charged with genocide and extermination as a crime against humanity for his participation in a joint criminal enterprise to kill Tutsis. He was convicted by the Trial Chamber and sentenced to fifty-five years imprisonment, but, on appeal, successfully argued that the Trial Chamber had misapplied the burden of proof in assessing his alibi.

The judgment is interesting in light of the analysis of the Appeals Chamber which criticized the Trial Chamber’s analysis. In particular, the Appeal Chamber noted that

[i]n reversing Zigiranyirazo’s convictions for genocide and extermination as a crime against humanity, the Appeals Chamber again underscores the seriousness of the Trial Chamber’s errors. The crimes Zigiranyirazo was accused of were very grave, meriting the most careful of analyses. Instead, the Trial Judgement misstated the principles of law governing the distribution of the burden of proof with regards to alibi and seriously erred in its handling of the evidence. Zigiranyirazo’s resulting convictions relating to Kesho Hill and the Kiyovu Roadblock violated the most basic and fundamental principles of justice. In these circumstances, the Appeals Chamber had no choice but to reverse Zigiranyirazo’s convictions.

## International Criminal Court

### **Prosecutor v. Jean-Pierre Bemba Gombo, Appeals Chamber Decision on Interim Release (Dec. 2, 2009)**

[Click here](#) for document (approximately 33 pages)

The Appeals Chamber of the International Criminal Court (ICC) reversed the Pre-Trial Chamber’s decision granting interim release of Jean-Pierre Bemba Gombo, a Congolese politician charged with war crimes and crimes against humanity.

Since surrendering to the ICC in July 2008, Bemba filed three applications for interim release with the Pre-Trial Chamber. All applications were denied because “there was sufficient evidence to establish substantial grounds to believe that Mr Bemba is criminally responsible under article 28 (a) of the Statute”; his detention was necessary to ensure his appearance at trial; and the court wished to ensure that no obstruction or endangerment

of the investigation or court proceedings would ensue. However, in August 2009, the defense asked the Chamber to review its prior decisions on continued detention citing “changed circumstances.” The Chamber reviewed the changed circumstances presented and ordered that Bemba be conditionally released “until decided otherwise,” and “that the implementation of this decision be deferred.” The ICC prosecutor appealed this decision on two grounds, claiming that: 1) the Pre-Trial Chamber committed error in granting the defendant conditional release based on “substantial change of circumstances; and 2) the Pre-Trial Chamber erred in ordering conditional release without imposing the necessary conditions and identifying a State to which the defendant will be released.

With respect to the first ground of appeal, the Appeals Chamber, noting that its review is limited to instances where the Pre-Trial Chamber committed clear errors of law, fact, or procedure, ruled that the Pre-Trial Chamber “erred in finding that there existed a change in circumstances that necessitated the conditional release of Mr Bemba.” According to the Appeals Chamber, the Pre-Trial Chamber “misappreciated and disregarded relevant facts in reaching its conclusion that the entirety of factors before it reflected a ‘substantial change of circumstances’” since the last review for interim release.

As to the second ground of appeal, the Appeals Chamber sided with the prosecution and held that the Pre-Trial Chamber erred in granting the conditional release without 1) determining the conditions for such release; 2) identifying the State to which the defendant will be released; and 3) ensuring that the potential State will be able to enforce the conditions imposed.

## Extraordinary Chambers in the Courts of Cambodia

### Decision on Independence of Pre-Trial Judges (Nov. 30, 2009)

[Click here](#) for document (approximately 7 pages)

The Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) has ruled on the motion requesting it to issue “appropriate measures” with respect to allegations of bias of the international pre-trial judges. The motion was filed by Ieng Sary, a former deputy prime minister and foreign minister of Democratic Kampuchea from 1975 to 1979, charged with war crimes and crimes against humanity. Citing numerous international and national decisions, including a decision by the International Criminal Tribunal for the former Yugoslavia (*Prosecutor v. Furundzija*) and several U.S. cases (by both the First and Tenth Circuits), the Chamber found the motion “inadmissible and unfounded” in fact and in law. The Pre-Trial Chamber also denied the request for a public hearing.

The issue of possible bias arose out of media statements by the Cambodian prime minister in the aftermath of a decision by the international judges supporting the investigation of additional suspects, wherein the Prime Minister alleged that “some foreign judges [of the ECCC—a hybrid tribunal composed of both national and international judges] have received orders from their governments.” While the international community dismissed the allegations as unfounded, the defense filed a motion to investigate this issue further.

Rule 34 of the [ECCC Internal Rules](#) considers the recusal and disqualification of judges and does not include provisions on other “appropriate measures” in cases challenging the independence and impartiality of judges. Nonetheless, the Pre-Trial Chamber applied Internal Rule 34(2), which allows “[a]ny party [to] file an application for disqualification of a judge in any case in which the Judge has a personal or financial interest or concerning which the Judge has, or has had, any association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias.” In particular, the Chamber noted that the appearance of bias, as clarified by *Furundzija*, requires the party alleging bias to prove that “a reasonable observer, properly informed, [would] reasonably apprehend bias.” In this respect, the Chamber noted that every analysis regarding bias starts with the “presumption of impartiality” and that the moving party “bears the burden of displacing that presumption.”

Applying this standard, the Chamber, citing a United States First Circuit case, *In re United States of America*, 666 F.2d 690 (1981), held that “disqualification applications have typically ignored ‘rumors, innuendoes, and erroneous information published as fact in the newspapers and threats or other attempts to intimidate the judge.’” In addition, because Rule 34, which forms the basis of the motion, only envisages the disqualification of judge if

the above burden is met, the Chamber concluded that it had no jurisdiction to review request for “general inquiry” without more evidence implying bias. As a result, the Chamber denied the motion requesting “appropriate measures.”

## NAFTA/UNCITRAL

### **Vito G. Gallo v. Canada, UNCITRAL - Challenge of Arbitrator (NAFTA Oct. 14, 2009)**

[Click here](#) for document (approximately 13 pages)

In *Vito G. Gallo v. Government of Canada*, an arbitration proceeding pending in the Permanent Court of Arbitration and being conducted under Chapter Eleven of the North American Free Trade Agreement (NAFTA) and pursuant to the UNCITRAL Arbitration Rules, the Deputy Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID) issued his decision on the challenge to an arbitrator appointed by the government of Canada. According to the decision, the arbitrator, J. Christopher Thomas, must choose between acting as an arbitrator in the dispute or continuing as an adviser to the government of Mexico.

The claimant alleged that the appointment of Thomas, an independent counsel on investment treaty issues to the government of Mexico (which is a State party to NAFTA and able to make submissions to the tribunal pursuant to NAFTA Article 1128), raised doubts regarding his neutrality and independence. Because Thomas had already started working as counsel for Mexico, the claimant sought his immediate disqualification from the arbitration proceeding. Notably, the claimant repeatedly stressed that “it did ‘not allege the existence of actual bias,’” but rather that “its challenge was ‘based upon the objective standards prescribed under Articles 9 and 10 of the UNCITRAL Arbitration Rules and applicable rules of international law.’”

Applying Article 10(1) of the UNCITRAL Arbitration Rules—the standard for determining the appropriateness of the arbitrator challenge—and accepting the timeliness of the challenge, the Deputy Secretary General found that the “arbitrator’s involvement” in this case was “problematic.” However, the Deputy Secretary-General rejected the application for immediate disqualification. Instead, he ordered Thomas to decide to continue either as legal counsel to Mexico and or as arbitrator in the arbitration.

This decision is interesting for two main reasons. It shows Mexico’s potential interference in the proceeding, and it is a rare instance where a UNCITRAL decision was made public.

## Briefly Noted

### **WIPO General Assembly Resolution Agenda Item 28 (Sept. 22 – Oct. 1, 2009)**

[Click here](#) for document (approximately 3 pages)

The General Assembly of the World Intellectual Property Organization (WIPO), a United Nations agency ensuring the accessibility and development of international intellectual property (IP), has adopted a resolution renewing the mandate of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. The General Assembly has authorized the Committee to commence “text-based” negotiations “with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection” of Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions/Traditional Folklore.

According to the WIPO website, the Intergovernmental Committee is currently reviewing draft provisions that would improve the protection of Traditional Knowledge and traditional cultural expressions against misappropriation and misuse.

**PDF** [Click here to view this issue of ILIB in a printable PDF.](#)

*\*Educational copying is permitted with due acknowledgment*

**International Law In Brief (ILIB) - Copyright 2009  
The American Society of International Law**

***Author:***

- Djurdja Lazic, Esq., ILIB Managing Editor
- Maria A. Taurisani, LL.M., ILIB Research Assistant

**To receive other ASIL publications, join ASIL at [www.asil.org](http://www.asil.org)**

*ILIB is a free-of-charge electronic resource. To sign up for ILIB [click here](#).  
To comment on this publication, send an e-mail message to Djurdja Lazic, ILM Managing Editor at [dlazic@asil.org](mailto:dlazic@asil.org)*