Updates from the International Criminal Courts

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Recommended Citation
The KLA emerged in the mid-1990s as an armed resistance movement to the official Serb-dominated regime in Kosovo and grew considerably in size from 1997-1999. It carried out numerous attacks on members of the Serbian police and army in Kosovo and set up roadblocks in the countryside. Despite claims by Serbs and some observers that the KLA is a terrorist organization, many Kosovars regard it as a legitimate guerrilla liberation movement that was, prior to NATO’s intervention, fighting against an oppressive and authoritarian regime.

Throughout its tenure, the ICTY has struggled to strike a balance between the international community’s demand that atrocities committed by Serbian forces be prosecuted and the perception that certain individuals, such as those who fought for the KLA, are not being held to equal account. Although the trial of Limaj, Musliu, and Bala had been seen by many as an attempt by the ICTY to avoid accusations of political bias, critics contend that the acquittal of Limaj and Musliu proves that the Tribunal is a “victor’s court.”

The indictment against Limaj, Musliu, and Bala claimed that KLA forces abducted at least 35 civilians, Serbs and “perceived Albanian collaborators,” who were detained in the Lapusnik prison camp for prolonged periods of time under inhumane conditions and routinely subjected to assaults, beatings, and torture. Fourteen named prisoners were alleged to have been murdered in the course of their detention. Ten additional prisoners were allegedly executed in the nearby Berisa Mountains on or about July 26, 1998, when Serbian advances forced the KLA to abandon Lapusnik.

Each of the accused were charged with eight counts for their acts at the Lapusnik prison camp, including one count of imprisonment, two counts of torture, one count of inhumane acts, two counts of murder as a crime against humanity punishable under Article 7(1) of the ICTY Statute, and two counts of cruel treatment punishable as war crimes under Article 3(7). The Prosecution charged each of the accused for their individual criminal responsibility for these crimes pursuant to Article 7(1) of the ICTY Statute. In addition, Limaj and Bala were each charged with two additional counts of murder (one count charged murder as a crime against humanity and one charged murder as violation of the laws or customs of war) for their alleged roles in the execution of detainees in the Berisa Mountains. Because Limaj and Musliu were alleged to have exercised both de jure and de facto command over the KLA forces in charge of the camp, the Prosecutor also charged them with superior responsibility for all of the alleged crimes pursuant to Article 7(3) of the ICTY Statute. The Prosecution thus had to prove that the alleged crimes against the prisoners at Lapusnik did in fact occur and that Limaj, Bala, and Musliu had committed them or were responsible for their commission as superior officers within the KLA.

Evidence established that most of the 30 referenced detainees at the Lapusnik camp were held in inhumane conditions and that the camp itself was grossly overcrowded. Several prisoners were tied by their hands or feet, or both, and most were chained to the wall and unable to move from their positions, which forced them to soil themselves. Many prisoners suffered injuries such as broken bones and gunshot wounds for which no medical treatment was provided. The Prosecution also presented evidence that the prisoners were regularly blindfolded, tied, and severely beaten or subjected to other extreme violence by masked KLA guards. Prisoners were forced to bury the injured and disfigured corpses of fellow prisoners, which the Tribunal characterized as severe mental suffering. The Chamber found that the detention and treatment of prisoners in these conditions constituted cruel treatment punishable as war crimes. It also concluded that the evidence established four incidents of torture and three murders of civilian prisoners at the Lapusnik camp. The Chamber held, however, that the Prosecution had failed to provide enough evidence to prove its allegation that 14 prisoners were murdered.

Five of the ten counts of the indictment alleged crimes against humanity. To constitute a crime against humanity, the conduct alleged must be part of a widespread or systematic attack directed against a civilian population. The Chamber dismissed these five counts because the acts did not constitute crimes against humanity. In its decision the Chamber stated that “there is evidence of a level of systematic or coordinated organisation to the abduction and detention of certain individuals.” The Chamber went on to explain, however, that “[w]hile the KLA evinced a policy to target those Kosovo Albanians suspected of collaboration with the Serbian authorities, the Chamber finds that there was no attack directed against a civilian population, whether of Serbian or Albanian ethnicity.”

As to the allegations that Limaj and Bala participated in the execution of detainees, the Chamber noted that when the KLA closed the Lapusnik camp in July 1998 half of the remaining detainees were marched into the Berisa Mountains. The bodies, later exhumed from graves in the area, were identified as part of the group who had remained under KLA guard upon evacuation from Lapusnik. Forensic examination further
established that six of the nine victims died from bullet wounds fired from Kalashnikov rifles, which were the weapons traditionally used by KLA guards. The Chamber found this evidence sufficient to conclude that these nine individuals were prisoners from the Lapsunik prison camp and that they had been executed by KLA guards.

The question of identification was central to the Prosecution's case against Limaj and Bala. Although the Tribunal noted that there was a "strong possibility" Limaj had been personally present at the prison, it held that the Prosecution had failed to prove his personal involvement in the crimes. Specifically, there was conflicting testimony about Limaj's presence at the Lapsunik prison and in the Berisa Mountains on the day of the executions. In weighing the evidence, the Chamber concluded that the Prosecution had not proven beyond a reasonable doubt that Limaj had any role in the crimes committed at the camp. With regard to Musliu, the judges also ruled that there was "little evidence to identify ... [him] as having any kind of involvement in the prison camp."

There was sufficiently more evidence linking Bala to the Lapsunik camp and the alleged murders of detainees. A number of witnesses identified Bala as a guard at the camp in June and July of 1998 and testified that he had relatively frequent contacts with prisoners. Bala was also identified as one of the guards who escorted prisoners to the Berisa Mountains. The Chamber did not consider the evidence sufficient to prove that Bala was criminally responsible for any of the murders at the camp, but he was found guilty of cruel treatment of prisoners based in part on his personal role in maintaining and enforcing the camp's inhumane detention conditions. He was also found guilty of one incident of torture and of participating in the murder of the nine civilians in the Berisa Mountains.

Although this trial brought to light the horrific events surrounding the Lapsunik camp, many have criticized the Tribunal's failure to categorize these acts as crimes against humanity or to hold Limaj and Musliu, the higher ranking KLA officials, accountable. This has been a consistent critique of the Tribunal, which has struggled against charges of political bias. Many in Kosovo believe that the ruling vindicates the KLA, which is often viewed as an amorphous group of guerilla forces, as a coherent and established political organization. The judgments have also raised speculation about the potential outcome of the upcoming joint trial of former Prime Minister Ramush Haradinaj and two others said to have been his subordinates in the KLA. The announcement of the Limaj judgment was televised in Kosovo and celebrated in the streets of Pristina. In Serbia, however, many continue to wonder who, other than Haradin Bala, will be held responsible for the brutal crimes perpetrated against civilians at the Lapsunik camp.

**International Criminal Tribunal for Rwanda**

**Prosecutor v. Aloys Simba, Case No. ICTR-01-76-T**

On December 13, 2005, Trial Chamber I of the International Criminal Tribunal for Rwanda (ICTR or Tribunal) issued its judgment in the case of *Prosecutor v. Simba*. Simba, a well-known political and military figure, fought with the Rwandan Army from 1963 to 1967 and led the 1973 military coup d'état that brought former President Juvenal Habyarimana to power. Simba's military achievements earned him prominence in Rwanda; the government recognized him as a national military hero and Rwandan schools taught their students about his achievements. From 1989 to 1993, Simba served as a member of the Rwandan parliament representing Gikongoro prefecture.

The Prosecutor charged Simba with genocide, complicity in genocide, and the crimes against humanity of extermination and murder. At the close of trial, the Prosecution withdrew the charges of complicity in genocide and murder as a crime against humanity. The Trial Chamber found that Simba's presence during the course of the attacks, provision of ammunition and weapons to the attackers, and urging of the attackers to "get rid of the filth" indicated that he shared the perpetrators' common purpose of killing Tutsi. With regard to the attacks at Cyanika Parish, however, the Trial Chamber had "some doubt that he equally shared the common purpose of killing Tutsi" because "there [was] no direct evidence linking him to Cyanika Parish or indicating that he knew and accepted that it would also form part of the operation." Because the Trial Chamber had previously determined that the killing of Tutsi in all three attacks was part of a common plan in which Simba participated, it is unclear why it sought to separately establish his intent to kill Tutsi at Cyanika Parish.

The Trial Chamber found that Simba participated in a joint criminal enterprise (JCE) with local leaders and other prominent individuals to kill Tutsi civilians at these three sites. Under the JCE form of liability, individuals may be held criminally responsible for their "assistance in, or contribution to, the execution of a common [criminal] purpose." The *actus reus* for JCE contains three elements: (1) "a plurality of persons," (2) "the existence of a common purpose which amounts to or involves the commission of a crime provided for in the Statute," and (3) "the participation of the accused in the common purpose." The basic form of JCE, which the prosecutor alleged in this case, requires that "all the co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention." For crimes with special intent requirements, all perpetrators must share the special intent.

Describing the three April 21, 1994, attacks as "a highly coordinated operation" that took place over the course of 12 hours, the Trial Chamber determined that the only reasonable explanation was that the attacks were the result of prior coordination by a plurality of persons acting with the common purpose of killing Tutsi. Although the Trial Chamber did not accept the Prosecutor's argument that Simba had necessarily taken part in planning the attacks, it found that he was a participant in the JCE and had coordinated his actions with other participants beforehand.

With regard to Murambi Technical School and Kadau Parish, the Trial Chamber found that Simba's presence during the course of the attacks, provision of ammunition and weapons to the attackers, and urging of the attackers to "get rid of the filth" indicated that he shared the perpetrators' common purpose of killing Tutsi. With regard to the attacks at Cyanika Parish, however, the Trial Chamber had "some doubt that he equally shared the common purpose of killing Tutsi" because "there [was] no direct evidence linking him to Cyanika Parish or indicating that he knew and accepted that it would also form part of the operation." Because the Trial Chamber had previously determined that the killing of Tutsi in all three attacks was part of a common plan in which Simba participated, it is unclear why it sought to separately establish his intent to kill Tutsi at Cyanika Parish.
Based on his involvement in the JCE, the Trial Chamber found Simba guilty of genocide for the massacres at Murambi Technical School and Kadau Parish. Noting that Tutsi are an ethnic group under the Statute’s definition of genocide, the Chamber found that all the participants in the JCE, including the accused, intended to kill members of a protected group. Moreover, the Trial Chamber looked to the scale and context of the massacres and found that the only reasonable conclusion was that the participants possessed the specific intent to destroy the Tutsi group in whole or in part.

Simba, however, argued that because of his “close association with Tutsi and his tolerant views” he did not personally act with the specific intent necessary for a finding of genocide. The Trial Chamber agreed that “there [was] no clear evidence that Simba was among the adherents of a hard line anti-Tutsi philosophy,” but, referring to the analysis of the ICTY Appeals Chamber in Kvocka et al., found that evidence of politically moderate views does not preclude a reasonable trier of fact from finding “in light of all the evidence provided” that an accused has acted with the requisite intent. Pointing to Simba’s words and actions at the massacre sites, as well as his military background and knowledge of the attacks, the Trial Chamber found that “the only reasonable conclusion, even accepting [the accused’s] submissions as true, is that at that moment, he acted with genocidal intent.” It is notable, however, that the Kvocka Appeals Chamber’s reasoning was not in reference to genocidal intent, but addressed whether discriminatory intent had been established for the crime against humanity of persecution.

The Trial Chamber held that Simba’s participation in the massacres at Murambi Technical School and Kadau Parish also met the requirements for extermination as a crime against humanity. The Chamber found that Simba had knowledge of the widespread attacks against Tutsi civilians in the area, was present at two of the massacre sites, and supported and encouraged the large-scale killing through his words and distribution of weapons.

In sentencing Simba to 25 years imprisonment, the Trial Chamber noted that, although Simba was a principle perpetrator in the JCE, he was not a formal member of the government at the time, did not physically participate in the crimes, did not linger at the massacre sites, and had subsequently condemned the genocide. Moreover, the Trial Chamber found that his prior record of public service could plausibly indicate that his crimes were motivated by “misguided notions of patriotism and government allegiance rather than extremism or ethnic hatred.” Noting that “a sentence of life imprisonment is generally reserved [for] those who planned or ordered atrocities and those who participate in the crimes with particular zeal or sadism,” the Chamber determined that Simba’s crimes did not warrant the most severe punishment.

**JUVÉNAL KAJELILJI V. PROSECUTOR, CASE NO. ICTR-98-44A-A**

On May 23, 2005, the ICTR Appeals Chamber issued its judgment in Juvelan Kaigeliji v. Prosecutor. Kajelijeli was bourgmestre of the Mukingo Commune from 1988 to 1993 and was reappointed to that post in June 1994. In its 2003 judgment, Trial Chamber II found that in April 1994 Kajelijeli exercised control over the Interahamwe militia, played an important role in transporting members of the Interahamwe to locations where they attacked Tutsi, provided Interahamwe with weapons for these attacks, and directed Interahamwe to massacre Tutsi, which resulted in the deaths of more than 300 individuals. For these acts, the Trial Chamber convicted Kajelijeli of both individual and superior responsibility for genocide and extermination as a crime against humanity and sentenced him to two concurrent terms of life imprisonment. The Trial Chamber also convicted him of individual responsibility for direct and public incitement to commit genocide, for which he received a concurrent 15-year sentence.

Kajelijeli filed appeals against his convictions, the length of his sentence, and the Trial Chamber’s dismissal of his preliminary motions challenging the Tribunal’s jurisdiction on the basis of the alleged illegality of his arrest and detention. The Appeals Chamber dismissed the majority of Kajelijeli’s appeals. It agreed, however, that the Tribunal had convicted Kajelijeli improperly on the basis of superior responsibility and had violated Kajelijeli’s rights during his arrest and detention. Consequently, the Trial Chamber reduced his sentence to 45 years imprisonment.

**CONVICT ON THE BASIS OF SUPERIOR RESPONSIBILITY**

Kajelijeli submitted that the Trial Chamber erred in finding that he exercised leadership and effective control over the Interahamwe and that he had the authority to stop the killings in Mukiango, Nkuli, and Kigombe Communes. Before addressing this argument, the Appeals Chamber recalled that in the Kordić and Čerkez case, among others, the ICTY Appeals Chamber had determined that “concurrent conviction for individual and superior responsibility in relation to the same count based on the same facts constitutes legal error invalidating the Trial Judgment.” Endorsing this view, the Appeals Chamber vacated Kajelijeli’s convictions for genocide and the crime against humanity of extermination in so far as they were made on the basis of superior responsibility and affirmed his convictions insofar as they were based on a finding of individual responsibility. Nevertheless, the Appeals Chamber found it necessary to consider whether Kajelijeli held a superior position over the Interahamwe in order to determine whether the Trial Chamber was correct in considering his superior position as an aggravating factor for the purposes of sentencing.

The Appeals Chamber noted that a superior is someone who possesses either de jure or de facto authority over subordinates and is able to exercise effective control over them. Rejecting Kajelijeli’s argument that to establish “effective control” there must be proof that an accused exercises either “the trappings of de jure authority” or “authority comparable to that applied in a military context,” the Appeals Chamber reiterated its finding in the Bagilishema case that a de facto civilian authority need only possess “the requisite degree of effective control.” In this case the evidence showed that Kajelijeli played a “pivotal role” in leading the attacks. For example, the Trial Chamber found, inter alia, that Kajelijeli instructed the Interahamwe to kill Tutsis and supervised attacks, and that the Interahamwe supplied him with daily updates on their efforts. Based on these facts, the Appeals Chamber affirmed the Trial Chamber’s conclusion that the Appellant held a de facto superior position as a civilian over the Interahamwe and
found that the Trial Chamber had been correct to consider this position at sentencing.

**VIOLATION OF FUNDAMENTAL RIGHTS DURING ARREST AND DETENTION**

Kajelijeli also alleged that the Trial Chamber had erred in denying his motions challenging the Tribunal’s personal jurisdiction on the basis of his alleged arbitrary arrest and illegal detention — decisions that the Appeals Chamber had itself twice affirmed. Deciding that it has the “inherent discretionary power” to correct any mistakes made in the past, the Appeals Chamber reconsidered Kajelijeli’s arguments. In its analysis the Appeals Chamber recognized two periods of his detention. The first period included the time from his arrest in Benin until his transfer to Arusha, Tanzania. The second period included the time from his arrival in Arusha until his initial appearance before the Tribunal.

**LEGALITY OF ARREST AND DETENTION IN BENIN**

At the request of the ICTR Prosecutor, in 1998 Benin authorities arrested Kajelijeli without a warrant. Kajelijeli was held in custody in Benin for 85 days before he was served with an ICTR arrest warrant or a confirmed indictment, and he was not brought before either a domestic or ICTR judge for 95 days. Kajelijeli argued that his arrest and detention in Benin were unlawful under ICTR Rule 40, which authorizes the Prosecutor to request that a state arrest a suspect preliminarily, and arbitrary under human rights law. Moreover, he argued that his right to be promptly informed of the charges against him under human rights law had been violated.

The Appeals Chamber noted that Rule 40 does not provide explicitly for a suspect’s right to be promptly informed of the charges against him or her or to be promptly brought before a judge. The Appeals Chamber also noted that “[i]t is for the requested State to decide how to implement its obligation under international law.” The Prosecution, however, has “overlapping responsibilities” with cooperating states and must “ensure that, once it initiates a case, ‘the case proceeds to trial in a way that respects the rights of the accused.’” Consequently, the Prosecution has a two-pronged duty: (1) to request state authorities to bring a suspect promptly before a domestic judge so that his or her rights, including to notice of the charges, are safeguarded; and (2) to promptly request the Tribunal to provide the cooperating state with a provisional arrest warrant and transfer order.

In determining whether the Tribunal had met its obligations with regard to the legality of Kajelijeli’s arrest by the Benin authorities, the Appeals Chamber found that Rule 40 did not require the Prosecutor to provide Kajelijeli with a copy of the arrest warrant. Moreover, “given the exigencies of the circumstance in which he was arrested,” the lack of either an ICTR or a domestic arrest warrant did not violate his due process rights. Kajelijeli was thus lawfully arrested under Rule 40. Nevertheless, in accordance with human rights law, “a suspect arrested at the behest of the Tribunal has a right to be promptly informed of the reasons for his or her arrest, and this right comes into effect from the moment of arrest and detention.” Although there was a dispute as to whether Benin authorities had informed Kajelijeli of the reasons for his arrest, the Appeals Chamber found that the Prosecutor could not rebut Kajelijeli’s claim that he had not been provided this information until he received a copy of the ICTR warrant and indictment 85 days after his arrest. Consequently, the Appeals Chamber held that Kajelijeli’s “right to be informed of the reasons as to why he was deprived of his liberty was not properly guaranteed.”

In determining whether the Tribunal had met its obligations with regard to the length of Kajelijeli’s detention, the Appeals Chamber emphasized that Rule 40, which authorizes provisional arrest and detention without an arrest warrant, must be read together with Rule 40bis, which “allows for the Prosecution, within a reasonable period of time, to request a Judge of this Tribunal to issue an order for the transfer of the suspect from the custody of that State to the custody of the Tribunal for purposes of provisional detention prior to issuance of an arrest warrant and indictment.” A Rule 40bis request, which should include any provisional charges against the suspect and a summary of the material on which the Prosecution has relied in making the charges, along with the order granting the request, must be served on the suspect as soon as possible. Together, Rule 40 and Rule 40bis “place time limits on the provisional detention of a suspect prior to issuance of an indictment” and “ensure that certain rights of the suspect are respected during that time.” Further,

The Appeals Chamber considers that it is not acceptable for the Prosecution, acting alone under Rule 40, to get around those time limits or the Tribunal’s responsibility to ensure the rights of the suspect in provisional detention upon transfer to the Tribunal’s custody under Rule 40 and 40bis, by using its power under Rule 40 to keep a suspect under detention in a cooperating State.

In determining whether the requirements of Rule 40 and Rule 40bis had been met in this case, the Appeals Chamber noted that, under human rights jurisprudence, the right to be brought “promptly” before a judge is violated if this does not take place within a few days of detention. Moreover, under human rights law, provisional detention of a suspect without charge is generally discouraged, although it may be lawful “as long it is as short as possible, not extending beyond a reasonable period of time.” The Appeals Chamber recalled that in the Barayagwiza case it had previously determined that, in exceptional circumstances, a suspect may be provisionally detained under Rule 40bis without being formally charged for a maximum of 90 days. This length of provisional detention, however, would be warranted only “so long as the protections provided for the suspect’s rights under Rules 40 and 40bis of the Rules are adhered to.” Because Kajelijeli’s rights were not adhered to, i.e., he was neither promptly provided with informal information as to the charges of which he was accused nor promptly brought before a judge, the Appeals Chamber found that his detention in Benin was unreasonable under both the ICTR Rules and human rights law. Moreover, it found that the Prosecution was partially responsible for these violations because it had failed to request a Rule 40bis transfer within a reasonable period of time.

**LEGALITY OF DETENTION IN ARUSHA**

After Kajelijeli’s transfer to the Tribunal detention facility, he was held in custody for 211 days prior to his initial appearance. He

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did not have assigned counsel for 147 of those days. Agreeing with Kajelijeli that his right to counsel had been violated by the Tribunal, the Appeals Chamber found that even if Kajelijeli frustrated efforts by the Registry to provide him with counsel of his choice Rule 44bis “clearly obligates the Registrar to provide a detainee with duty counsel, with no prejudice to the accused’s right to waive the right to counsel.” Moreover, Rule 44bis states that this requirement “exists from the very moment of transfer to the Tribunal and is not confined to purposes of the initial appearance only.”

Likewise, the Appeals Chamber found that the Tribunal had violated Kajelijeli’s right to an initial appearance. It noted that, on their face, Article 19(3) of the ICTR Statute and Rule 62 of the Rules require that, once an accused is taken into the Tribunal’s custody, he or she should appear before the Trial Chamber or a judge “without delay” in order to be formally charged. The wording of Rule 62 is “unequivocal” in this regard because of the important purposes that the initial appearance serves, including entering a plea, reading the official charges against the accused, ascertaining the identity of the detainee, ensuring the rights of the accused have been respected, giving the accused an opportunity to voice complaints, and scheduling a date for the trial or sentencing. Consequently, regardless of whether there were difficulties in assigning counsel for Kajelijeli, the Tribunal should have scheduled his initial appearance without delay.

**Remedy for Violation of Appellant’s Fundamental Rights**

In examining whether these violations of Kajelijeli’s fundamental rights should result in the Tribunal’s loss of personal jurisdiction, the Appeals Chamber found that, because it must “maintain the correct balance between ‘the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law,” it should only decline to exercise its jurisdiction “where to exercise jurisdiction in light of serious and egregious violations of the accused’s rights would prove detrimental to the court’s integrity.” For example, this may be appropriate when an accused is “seriously mis-treated” before being turned over to the Tribunal. Because the Appeals Chamber did not consider the facts of this case to fall within this exceptional category, it held that that the remedy of setting aside jurisdiction would be disproportionate. Instead, the Appeals Chamber found that the appropriate remedy for these violations was to reduce Kajelijeli’s sentence.

**Sentencing**

Noting that the Trial Chamber “is required to take into account any mitigating circumstances in determining a sentence[,]” the Appeals Chamber found that the Trial Chamber erred in finding that Kajelijeli did not deserve any credit for allowing his wife to shelter four Tutsi in his Musingo home, offering words of comfort to them, and agreeing not to evacuate his wife and children partly on their account. Nevertheless, the Appeals Chamber held that the Trial Chamber did not abuse its discretion in finding that these mitigating circumstances, even if they had been taken into account, did not require a reduction in Kajelijeli’s sentence.

With regard to its decision to vacate Kajelijeli’s convictions based on superior responsibility, the Appeals Chamber concluded that this change had no impact on his sentence. To remedy the violations of Kajelijeli’s rights during his arrest and detention, however, the Appeals Chamber set aside Kajelijeli’s two life sentences and 15-year sentence and imposed a single sentence of 45 years imprisonment, minus credit for time served.

**Jean De Dieu Kamuhanda v. Prosecutor, Case No. ICTR-99-54A-A**

On September 19, 2005, the ICTR Appeals Chamber delivered its judgment in the case of Jean De Dieu Kamuhanda v. Prosecutor. Jean De Dieu Kamuhanda served as Minister of Higher Education and Scientific Research in the interim government of Rwanda from May 25, 1994, to mid-July 1994. Before 1994 his various government positions had made him influential in Gikomero Commune (Kigali-Rural Prefecture). In its 2004 judgment, Trial Chamber II found that during the genocide Kamuhanda had distributed weapons to members of the Interahamwe and others in Gikomero. It also found that on April 12, 1994, Kamuhanda initiated and led attackers in slaughtering Tutsi who had taken refuge in a local church. The Trial Chamber sentenced Kamuhanda to life imprisonment after convicting him of genocide and extermination as a crime against humanity. The Appeals Chamber dismissed all but one of Kamuhanda’s allegations of error with respect to the Trial Chamber judgment, vacated his convictions as far as they were based on the modes of responsibility of instigating and aiding and abetting, and confirmed his convictions as far as they were based on the mode of responsibility of ordering. Despite this amendment to the conviction, the Appeals Chamber determined that the “full picture of the case” had not changed and thus no modification in sentencing was required.

**Modes of Responsibility: Instigating, Aiding and Abetting, Ordering**

Kamuhanda argued that the Trial Chamber erred in finding him responsible for genocide and extermination based on the modes of responsibility of instigating, aiding and abetting, and ordering. With regard to instigation, Kamuhanda argued that the Prosecutor had not shown a causal link between his alleged incitement to kill and the April 12, 1994, attack at Gikomero Parish Compound. The Appeals Chamber first noted that the Trial Chamber’s factual findings were unclear as to which assailants Kamuhanda had instigated. The Prosecution asserted that the Trial Chamber’s factual findings related to a meeting at Kamuhanda’s cousin’s house a few days before the Parish attack, during which Kamuhanda distributed guns, grenades, and machetes and encouraged those present to distribute the weapons to others and to begin the killing in Gikomero Commune. The Prosecution argued that, due to Kamuhanda’s influence and authority in Gikomero, it was “only reasonable [for the Trial Chamber] to conclude that the persons who had been present during the meeting … encouraged the perpetrators of the killings,” even if they were not present at the attacks themselves. The Appeals Chamber rejected this reasoning as speculative due to the lack of evidence that the individuals who met at the cousin’s house were present at the massacre at the Parish Compound or that the attackers came from Gikomero and thus would necessarily have been influenced by
Kamuhanda. As a result, it held that the finding that Kamuhanda had instigated assailants to kill members of the Tutsi ethnic group was not supported by the evidence.

Kamuhanda also argued that the Trial Chamber had erred in concluding that he had aided and abetted the massacre at Gikomero Parish Compound. The Appeals Chamber again noted the lack of evidence that anyone who had received a weapon at Kamuhanda’s cousin’s house had taken part in the attack or that any of the weapons Kamuhanda distributed had been used in the attack. Consequently, it disregarded this factual finding. Nevertheless, it determined that there were several other findings in the record — including a finding that Kamuhanda had told the attackers at the Parish Compound to “work,” which was understood as “an order to start the killings” — that supported the conclusion that Kamuhanda had directly and substantially contributed to the killings at the Gikomero Parish Compound as an aider and abettor.

Judge Schomburg disagreed with the Appeals Chamber’s determination “that the evidence does not support any connection between the distribution of weapons and the subsequent attack.” He asserted that the Trial Chamber had reasonably proved such a connection, particularly through the testimony of Witness GEK, a “highly credible” witness who testified that the weapons distributed at the home were the ones used during the massacre. Schomburg noted “even if the weapons that were distributed by Kamuhanda had not been used at all, their mere distribution amounted to psychological assistance, as it was an act of encouragement that contributed substantially to the massacre, thus amounting to abetting if not aiding.”

With regard to the Trial Chamber’s finding that Kamuhanda ordered the attackers to kill the Tutsi who had taken refuge in the Parish Compound, Kamuhanda asserted that it had not been demonstrated that he held a position of authority in relation to the assailants. The Appeals Chamber, however, found that a reasonable trier of fact could conclude that Kamuhanda had authority over the attackers because they obeyed his order to start the massacre.

Although the Appeals Chamber determined that the facts supported Kamuhanda’s conviction both for aiding and abetting and ordering, it ultimately vacated the conviction in so far as it was based on aiding and abetting. In doing so, the Appeals Chamber noted that, because both of these modes of responsibility were based on the same set of facts (i.e., Kamuhanda leading the attack and ordering the attackers to start the killings), and because the finding that Kamuhanda had distributed weapons was found to be insufficient to maintain a conviction for aiding and abetting, the mode of responsibility of ordering “fully encapsulate[d]” Kamuhanda’s criminal conduct at the Gikomero Parish Compound.

In separate opinions Judges Schomburg, Shahabuddeen, and Meron expressed different views as to the basis for and appropriateness of this holding. Judge Schomburg agreed with the decision to convict Kamuhanda for “the more specific mode of liability” and argued that it would be a “violation of the principle of logic to punish a person for having ordered and aided and abetted at the same time in relation to the same offense if ordering and aiding and abetting [were] based on the same criminal conduct.” On the other hand, Judge Shahabuddeen strongly disagreed with the holding, which he found to be “a significant extension” of the Chamber’s previous decisions regarding concurrent convictions. Noting that “[t]he fact that more than one method is employed does not mean that there is more than one conviction for the crime,” he asserted there was no reason why an accused could not be convicted for a crime based on multiple methods of responsibility so that the “true measure” of his or her criminal conduct could be defined. Although Judge Meron agreed with Judge Shahabuddeen that an accused can be prosecuted for multiple modes of responsibility for a single crime, in his view the Appeal Chamber’s determination was “relevant only to the factual findings of this particular case.” For this reason he did not consider this decision to make any change to the law of the Tribunal.

ADDITIONAL TESTIMONY ADMITTED REGARDING KAMUHANDA’S ALIBI

Unusually, the Appeals Chamber decided to hear additional testimony with regard to Kamuhanda’s alibi defense. Witness GAA had testified before the Trial Chamber that he had seen Kamuhanda at the Gikomero Parish Compound on April 12, 1994. In his testimony before the Appeals Chamber, however, GAA stated that he had not been at the Parish Compound on April 12th but had testified falsely because he had believed Kamuhanda was responsible for the death of many of his family members. Similarly, Witness GEX had testified before the Trial Chamber that Kamuhanda was present at the Parish Compound on April 12th and had started the attack by saying the word “mukore,” which means “to work.” Before the Appeals Chamber, however, GEX testified that she had not seen Kamuhanda at the Parish that day and that she and several witnesses had colluded to incriminate Kamuhanda.

Despite this testimony the Appeals Chamber found it “highly implausible” that these witnesses would have been able to invent the detailed testimony they had originally provided, “which [was] corroborated by other evidence.” The Appeals Chamber noted that “[w]itness GAA was consistent for many years in his statements that he had been at the Gikomero Parish in 1994, and that he had seen [Kamuhanda] there.” Further, the Appeals Chamber took into account that neither GEX nor GAA had contacted the Prosecution to recant their testimony, but instead first contacted the Defense. The Appeals Chamber consequently dismissed the additional evidence in its entirety and noted that “if additional evidence admitted on appeal is subsequently determined by the Appeals Chamber to be irrelevant or not credible, it provides no basis for disturbing the Trial Chamber’s judgment, since it could not have been a decisive factor if the Trial Chamber had considered it.”

TRUTH COMMISSIONS IN TIMOR LESTE

COMMISSION OF TRUTH AND FRIENDSHIP

In December 2004 Timor Leste and Indonesia agreed on the establishment of a joint Commission of Truth and Friendship (CTF). The two governments established the CTF to address reported violations of human rights prior to and immediately following the East Timorese popular consultation in 1999, with a view to further promoting reconciliation and friendship and preventing a recurrence of similar violence.
The first phase of the CTF was selecting its members and handling other administrative matters. The ten-member panel is composed of legal experts, human rights figures, and at least one retired military commander. Indonesian members include Achmad Ali, Wisber Loeis, Benjamin Mangkudilaga, Petrus Turang, and Agus Widjojo; Timorese members include Jacinto das Neves Raimundo Alves, Dionisio da Costa Babo Soares, Aniceto Longuinhos Guterres Lopes, Felicidade de Sousa Gutерeres, and Cirillo Jose Jacob Valadareo Cristovao.

On December 16, 2005, the CTF announced that it would confine its work to reviewing the previous investigations and court proceedings of the Indonesian National Commission of Inquiry on Human Rights Violations in East Timor in 1999 and the Ad-hoc Human Rights Court on East Timor, as well as the Special Panels for Serious Crimes (SPSC). Experts formed during the SPSC’s mandate determined in June 2005 that the trials in Jakarta for crimes committed in East Timor were “manifestly inadequate, primarily due to a lack of commitment on the part of the prosecution,” and that “[m]any aspects of the ad hoc judicial process reveal[ed] scant respect for or conformity to relevant international standards.” As an alternative, it suggested the creation of an international tribunal such as those in Rwanda and the former Yugoslavia, but both Timor Leste and Indonesia have rejected this suggestion as unnecessary in light of the establishment of the Commission of Truth and Friendship (see above). The UN Commission further found that there was “frustration among the people of Timor-Leste about the inability of the judicial process to bring to justice those outside the country’s jurisdiction, particularly high-level indicts.”

UNTAET also established a Commission for Reception, Truth and Reconciliation in Timor (CAVR) as a complement to the (now defunct) work of the Serious Crimes Investigation Unit. The CAVR investigated human rights abuses that occurred from 1974 to 1999 and issued its final report to Timorese President Xanana Gusmão in October 2005. On January 20, 2006, Timorese President Xanana Gusmão presented the report to the United Nations. The document outlines torture, arbitrary killing, massacres, and the starvation of some 100,000 to 180,000 East Timorese during Indonesia’s 24-year occupation.

President Gusmão, Foreign Minister José Ramos-Horta, and Defense Minister Juwono Sudarsono have all publicly stated that they do not want to pursue punishment of those responsible for these atrocities. They prefer to encourage efforts at reconciliation in the hopes of avoiding any destabilization that could accompany criminal prosecutions and to avoid alienating Indonesia, which is their most important trading partner. Similarly, the Commission on Truth and Friendship’s Terms of Reference states that “Different countries with their respective experiences have chosen different means on confronting their past. The leaders and people of South Africa, where apartheid was defined as a crime against humanity, opted to seek truth and reconciliation. Indonesian and Timor-Leste have opted to seek truth and promote friendship as a new unique approach rather than the prosecutorial process.”

On February 14, 2006, Timorese Prime Minister Mari Alkatiri announced that the country will not seek economic compensation from Indonesia. This also makes it unlikely that Timor Leste will seek reparations from countries that supported Indonesia during the occupation, including France, the United Kingdom, and the United States. Nevertheless, despite these conciliatory actions, relations between Indonesia and Timor Leste remain strained. Following the release of the CAVR report, Indonesia cancelled meetings that had been scheduled between the presidents of both countries to discuss human rights abuses.

**Extraordinary Chambers in the Courts of Cambodia**

In December 2005 the Extraordinary Chambers in the Courts of Cambodia (ECCC) approved a facility in Kambol as its headquarters, where operations began in mid-February. The site, which was officially presented to the Royal Government Task force for
the Khmer Rouge on January 18, 2006, will also house the UN component of the court led by Administrative Deputy Director Michelle Lee. Because the site is located several kilometers outside of Phnom Penh, the ECCC will need to install public transportation to facilitate access by ordinary citizens.

TRIBUNAL

The ECCC has three goals: to offer justice to victims and survivors of crimes committed by the Khmer Rouge from April 17, 1975, to January 6, 1979; to prevent similar atrocities in the future; and to give younger generations of Cambodians better information about the crimes that occurred under the Khmer Rouge regime.

The ECCC will consist of two chambers: a trial chamber with three Cambodian judges and two international judges and an appellate chamber, composed of four Cambodian judges and three international judges. Judgments will necessitate a super majority, which requires international judges to concur in any judgment. The ECCC’s mandate gives it personal jurisdiction over “senior leaders” and “those most responsible for the most serious violations,” including war crimes, genocide, crimes against humanity, crimes against internationally protected persons, and violations of Cambodia’s 1956 Penal Code. The ECCC’s temporal jurisdiction will cover 1975-1979, the period when the Khmer Rouge governed Cambodia.

On March 15, 2006, the Cambodian government and the United Nations worked out the final details for the ECCC. The agreement covered topics such as security and safety arrangements, as well as outlining how facilities and services will be provided. The Cambodian government will provide the trial buildings, detention facilities for the accused, safe housing for witnesses, and all electricity, water, and telephone services, while the UN will provide vehicles, computers, training, and general support for the defense. Trials are expected to commence in 2007. Judicial and prosecutorial appointments are expected by July of this year.

Suspects

The ECCC will focus on trying the high-level officials of the Khmer Rouge regime. The Cambodian Documentation Center has identified some of the suspects it expects will face charges.

Ieng Sary was foreign minister in the Khmer Rouge regime. There is evidence that he publicly encouraged arrests and executions. He is 76 years old and currently lives in Phnom Penh under police protection. It was reported on February 18, 2006, that Ieng Sary was very ill and suffering from heart complications, but his daughter, Ieng Vithika, has said that her father is in good health.

Kaing Khek Ieu was the commander of the secret police prison S-21, known for its brutal torture and interrogation techniques. He is now 63 years old and has been in military custody since 1999.

Khieu Samphan was the president of Democratic Kampuchea (as the country was called under the Khmer Rouge). He is 74 years old and currently lives in Pailin, a former Khmer Rouge stronghold in northwest Cambodia.

Nuon Chea was known as Brother No. 2, second only to Pol Pot in the Khmer Rouge. As the leading ideologue of the Khmer Rouge, he is suspected of devising and implementing the execution policies of the Khmer Rouge regime. He is now 79 years old and lives in Pailin near Khieu Samphan.

Ung Choeun was the commander of the military under the Khmer Rouge. He was known as “the Butcher” and is rumored to have been one of the cruelest of the Khmer Rouge leaders. He is currently 78 years old and has been in military custody since 1999.

Budget

Upon the ECCC’s formation, the United Nations and Cambodia agreed to share its costs. Under this agreement, the UN would provide $43 million and Cambodia would cover the remaining $13 million. Cambodia has had significant problems meeting its share of costs, and the ECCC is now seeking more donors and funding.

In October 2005 India contributed $1 million to the Cambodian government earmarked for the ECCC. On December 28, 2005, the European Commission announced that it would provide $1.2 million to help Cambodia cover its portion of the ECCC’s costs. Thailand has contributed $25,000, and Armenia and Namibia have contributed $1,000 and $500, respectively. On March 12, 2006, trial press officer Reach Sambath announced that six major donors (out of 27 participating countries) have agreed to release funds left over from United Nations Transitional Authority in Cambodia to fill the ECCC’s $9.6 million budget shortfall; three major donors have asked for more time to decide.

Through the work of the Documentation Center of Cambodia, the United States has spent millions of dollars funding research and documentation of alleged war crimes committed in Cambodia. The U.S. has refused to support the ECCC, however, either through the UN or through direct support to the government. The United States Foreign Operations Appropriations Acts of 2004 and 2005 bar funding to Cambodia because of the sporadic political violence the government has allegedly condoned. Because the 2006 Foreign Operations Appropriations Act does not contain similar prohibitions, however, the U.S. may provide support in the future.

International Comments

In late January 2006, Human Rights Watch expressed concerns that the ECCC will not meet international standards given Cambodia’s notoriously corrupt judiciary. The group noted particularly the importance that the ECCC be free from government control, interference, and intimidation. Nevertheless, most international organizations support the ECCC because it is likely Cambodia’s last opportunity to see any accountability for Khmer Rouge crimes.

New and Notable

Extradition of Charles Taylor to the Special Court for Sierra Leone

On March 26, 2006, the Special Court for Sierra Leone’s Chief Prosecutor, Desmond de Silva, officially requested that Nigerian President Olusegun Obasanjo “have his authorities execute the warrant for the arrest of Charles Taylor issued by the Special Court and transmitted to Nigeria in November 2003.” De Silva’s request came shortly after newly elected Liberian President Ellen Johnson-Sirleaf told the UN...
Security Council that she had formally asked President Obasanjo to extradite Taylor so he could stand trial at the Special Court. On March 29, 2006, Nigerian police arrested Taylor as he was attempting to cross into Cameroon and “repatriated” him to Liberia, whereupon he was placed in the Special Court’s custody.

Taylor served as President of Liberia form 1997 to 2003 and was indicted by the Court in March 2003 for war crimes committed during the civil war that gripped much of the region in the early 1990s. On April 3, 2006, Taylor made his initial appearance before the Court and pled not guilty to eleven counts of the amended indictment, including five counts of crimes against humanity (murder; rape; sexual slavery and any other form of sexual violence; other inhumane acts; and enslavement) and six counts of violations of Article 3 common to the Geneva Conventions and Additional Protocol II (acts of terrorism; murder; outrages upon personal dignity; cruel treatment; conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities; and pillage). Citing security concerns, the Special Court has since formally requested that the Netherlands host Taylor’s trial, an option that President Johnson-Sirleaf also supports.

DEATH OF SLOBODAN MILOSEVIC

On March 11, 2006, Slobodan Milosevic, former President of the Federal Republic of Yugoslavia was found dead in his cell in the Scheveningen Detention Unit of the International Criminal Tribunal for the Former Yugoslavia (ICTY). ICTY President Judge Fausto Pocar ordered a full inquiry into his death, although Dutch authorities later confirmed that Milosevic, who suffered from chronic heart ailments, died of natural causes. On March 14, 2006, the Trial Chamber that was trying Milosevic ordered the proceedings against him terminated.