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NEWS FROM THE INTERNATIONAL CRIMINAL TRIBUNALS

by Kelly Askin*

The year 1999 is witnessing extensive activity in the two United Nations *ad hoc* tribunals established to prosecute serious violations of international law committed in the territory of the former Yugoslavia and in Rwanda. To date, the International Criminal Tribunal for the former Yugoslavia (ICTY) has handed down six judgments (five after trials on the merits and one sentencing judgment after a guilty plea). The ICTY rendered two of the six judgments, the Aleksovski Judgement and the Jelisić Judgement, this year. As of October 1999, the International Criminal Tribunal for Rwanda (ICTR) has handed down four judgments (two after trials on the merits and two after guilty pleas). The ICTR rendered the Kayishema and Ruzindana Judgement and the Serushago Sentencing Judgement this year. Also in 1999, the common Appeals Chamber handed down the judgment in the *Tadić* appeals case.

Despite the tribunals' activity, the most important achievement was the ICTY's issuance of the Milošević *et al.* Indictment on May 24, 1999. In the indictment, the Office of the Prosecutor (Prosecutor) brought charges against Slobodan Milošević and four other Serbian military and political leaders for alleged crimes committed in Kosovo between January and May 1999. This indictment is the first time that a head of state has been indicted for serious violations of international humanitarian law during an ongoing armed conflict.

On August 11, 1999, the UN Security Council appointed Carla Del Ponte of Switzerland to replace Louise Arbour of Canada as the Chief Prosecutor of the two tribunals. Del Ponte assumed her duties on September 15, 1999. The former president of the ICTY (who presides over the common Appeals Chamber), Judge Gabrielle Kirk McDonald of the United States, resigned and, effective November 17, 1999, Judge Patricia Wald of the United States replaced her (as judge, not president). Judge Claude Jorda (France) was elected president of the ICTY in November 1999, and Judge Florence Mumba (Zambia) was elected vice-president. Also during 1999, three new judges were elected to the ICTR: Judge Erik Møse (Norway), Judge Mehmet Güney (Turkey), and Judge Asoka de Zoysa Gunawardana (Sri Lanka). Judge Navanethem Pillay of South Africa, the sole woman judge in the ICTR, was elected president of the ICTR in June 1999.

The Appeals Chamber

According to the ICTY and ICTR Statutes, the Appeals Chamber hears appeals from persons that either tribunal convicts, or appeals from the Prosecutor on a question of law invalidating the decision or an error of fact, causing a miscarriage of justice. The Rules of Procedure and Evidence of the ICTR and ICTY also empower the Appeals Chamber to review decisions at the request of a state directly affected by an interlocutory decision, if the decision concerns issues of general importance to the tribunals.

Tadić Judgement

On May 7, 1997, Trial Chamber II of the ICTY issued the *Tadić* Judgement, finding Dušan Tadić guilty on 9 counts and

guilty in part on 2 counts; combined, these 11 counts constituted both violations of the law or customs of war, including violations of Article 3 Common to the Geneva Conventions (Common Article 3), and crimes against humanity. The Trial Chamber found Tadić not guilty on 20 counts, including 9 counts of murder (because of insufficient evidence) and 11 counts relating to grave breaches of the 1949 Geneva Conventions (because of non-applicability). On July 15, 1999, in its first decision reviewing a trial chamber judgment after a trial on the merits, the Appeals Chamber rendered judgment in the *Tadić* case, finding him guilty on nine additional counts.

The Defense appealed the judgment based on two grounds: (1) that the proceedings prejudiced Tadić's right to a fair trial because there was no "equality of arms" between the Defense and Prosecutor; and (2) that the Trial Chamber erred in finding him guilty of the murders of Osman Didović and Edin Bešić, two Muslim policemen. The Defense sought to have the Appeals Chamber set aside the guilty verdicts and order a re-trial. In the alternative, the Defense sought to have the Appeals Chamber reverse the guilty verdicts for the murders of the policemen and review Tadić's sentence. In addition, the Defense had previously requested leave to amend its Notice of Appeal to include a third ground for appeal—that the conduct of

Tadić's former attorney, Milan Vujin, "gravely prejudiced" Tadić's ability to receive a fair trial. The Appeals Chamber had denied this ground on January 25, 1999.

The Prosecutor filed five cross-appeals. The Prosecutor appealed 7 of the Trial Chamber's 11 not guilty verdicts relating to grave breaches of the 1949 Geneva Conventions and two of the not guilty

verdicts concerning Tadić's alleged participation in the killings in Jaskići. The Prosecutor also challenged the Trial Chamber's determination that an individual cannot commit a crime against humanity if the individual did not understand the crime was part of a widespread or systematic attack and committed the offense for purely personal reasons not related to the armed conflict. It also challenged the Trial Chamber's determination that crimes against humanity require the element of discriminatory intent. Finally, the Prosecutor argued that Trial Chamber II erred in its decision denying the Prosecutor's motion to produce defense witness statements.

Tadić's Appeal Against Judgment

Inequality of Arms

The Defense's first ground for appeal concerned a complaint that circumstances disproportionately impacting Tadić's case—such as the failure of the *Republika Srpska* to cooperate by securing witnesses—prejudiced Tadić's right to equality of arms between the Prosecutor and the Defense. The right to a fair trial is embodied in Article 21(4)(b) of the ICTY Statute and the equality of arms principle dictates that each party must have a reasonable opportunity to defend its interests "under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent." Because of the terms of the ICTY

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Statute, and the ICTY's limited enforcement powers and reliance on state cooperation, the Appeals Chamber found that the tribunals must broadly interpret this principle. The Appeals Chamber determined that the ICTY "shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case." The Appeals Chamber, however, noted that the Defense did not contest that Trial Chamber II took virtually all measures within its authority to assist the Defense when requested and necessary. The Appeals Chamber denied the Defense's appeal, finding that the Defense was silent about the difficulties it encountered while defending Tadić, and did not provide evidence that Trial Chamber II failed to assist the accused, thereby denying Tadić equality of arms.

Murder of Two Policemen

In its second ground for appeal, the Defense alleged that an error of fact led to a miscarriage of justice. The Defense argued that Trial Chamber II should not have convicted Tadić for the murder of two policemen, Osman Didović and Edin Bešić. The parties agreed that reasonableness was the standard to be used in determining whether a trial chamber's factual finding should stand. Noting that a trial chamber's judges have the task of hearing, assessing, and weighing the evidence presented at trial, the Appeals Chamber determined that it must give a margin of deference to a trial chamber's findings of fact. In his appeal, Tadić complained that the Trial Chamber convicted him of the murders based solely on the testimony of one allegedly unreliable witness. The Appeals Chamber concluded that the Defense failed to establish that the witness was suspect or that his testimony was implausible. Therefore, the Appeals Chamber had no basis to consider whether the Trial Chamber acted unreasonably in relying on this testimony and rejected this appeal.

The Prosecutor's Cross-Appeals

The Prosecutor filed five cross-appeals. Two cross-appeals concerned acquittals; three regarded matters of general importance affecting the conduct of trials before the ICTY and the parties deemed the three issues to merit the attention of the Appeals Chamber.

Grave Breaches and "Protected Persons"

The Prosecutor's first ground for cross-appeal was Trial Chamber II's finding that the Prosecutor did not prove that the victims were "protected persons" under Article 2 of the ICTY Statute, granting jurisdiction over grave breaches of the 1949 Geneva Conventions. For Article 2 to apply, a trial chamber must establish that: (1) the conflict, at all relevant times, was international; and (2) the victims of the alleged grave breach were "protected persons," according to the 1949 Geneva Conventions.

The Appeals Chamber noted that an internal armed conflict may in certain circumstances become international if another state intervenes in the conflict through its military forces or if participants in the internal conflict act on behalf of another state or agency. The Appeals Chamber found that international law provides three tests, which courts may apply to determine whether individuals or groups are *de facto* organs of another state or agency: (1) a test of "overall control" to determine if the acts of armed groups can be attributable to a state; (2) a test of "specific instructions (or subsequent public approval)" to determine if individuals or militarily unorganized groups act on behalf of states; and (3) a test of "assimilation of individuals to State organs on account of their actual behaviour within the

structure of a State (and regardless of any possible requirement of State instructions)." The Appeals Chamber concluded that the armed forces of the *Republika Srpska* acted under the "overall control" of, and on behalf of, the Federal Republic of Yugoslavia (FRY), and thus it concluded that "even after 19 May 1992 the armed conflict in Bosnia and Herzegovina between the Bosnian Serbs and the central authorities of Bosnia and Herzegovina must be classified as an *international* armed conflict."

In determining whether the victims were "protected persons" under the Fourth Geneva Convention, the Appeals Chamber defined "protected persons" as those who do not have diplomatic protection and who are "not subject to the allegiance and control" of the state in whose hands they may find themselves. Therefore it is the substance of the relations between the parties, not their legal characterization, which is controlling. The Appeals Chamber determined that the victims were "protected persons" because they had no allegiance to the party in whose hands they were. Consequently, the Appeals Chamber concluded that Trial Chamber II erred in acquitting Tadić of grave breaches of the 1949 Geneva Conventions and reversed Trial Chamber II's not guilty verdict as to the seven grave breach counts on cross-appeal.

Insufficient Evidence Concerning the Killings in Jaskići

The Prosecutor's second ground for cross-appeal concerned Trial Chamber II's finding that sufficient evidence did not exist to establish that Tadić participated in the killing of five men in Jaskići. The Prosecutor complained that Trial Chamber II misapplied the reasonable doubt standard of proof and the common purpose doctrine. The common purpose doctrine holds, in part, that if an individual "knowingly participates in a criminal activity with others, he or she will be liable for all illegal acts that are natural and probable consequences of that common purpose." After reviewing case law, the Appeals Chamber held that common design as a form of accomplice liability is firmly established in customary international law and is implicit in the ICTY Statute.

In the Tadić case, the Appeals Chamber concluded, based upon the factual findings of Trial Chamber II, that Tadić actively participated in a common criminal purpose and that he actively took part in a common criminal purpose to attack Jaskići. Consequently, the Appeals Chamber held that Trial Chamber II's only possible conclusion was that Tadić had the intent to participate in the common criminal purpose to commit inhumane acts, and willingly took the foreseeable risk that members of the group being attacked might be killed. The Appeals Chamber, therefore, held that the Trial Chamber erred in finding that the Prosecutor did not prove beyond a reasonable doubt that Tadić had any part in the killing of the five men from Jaskići. The Appeals Chamber set aside Trial Chamber II's not guilty verdict on these charges and found Tadić guilty in the death of the five men.

Crimes Against Humanity—Purely Personal Motives

The Prosecutor's third ground for cross-appeal concerned Trial Chamber II's finding that an individual cannot commit crimes against humanity for purely personal reasons. The Appeals Chamber concluded, after reviewing Article 5 of the ICTY Statute and customary international law that the perpetrator's motive is not relevant to establishing evidence of crimes against humanity. Thus, it opined that the requirement that an act be carried out for purely personal motives does not form part of the prerequisite elements necessary to prove the commission of a crime against humanity.

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Crimes against Humanity—Discriminatory Intent

The Prosecutor's fourth ground for cross-appeal concerned Trial Chamber II's finding all that crimes against humanity require a discriminatory intent. The Appeals Chamber reviewed Article 5 of the ICTY Statute and customary international law to determine that discriminatory intent is not a required element of crimes against humanity. It also reviewed a Report of the Secretary-General and statements of Security Council Members concerning Article 5 of the ICTY Statute and deemed these "interpretive sources" insufficient to establish that all crimes against humanity must be committed with discriminatory intent. Thus, the Appeals Chamber held that Trial Chamber II erred in finding that all crimes against humanity require a discriminatory intent.

Disclosure of Defense Witness Statements

The Prosecutor's fifth ground for cross-appeal resulted from Trial Chamber II's earlier denial of the Prosecutor's motion for disclosure of a prior statement of a Defense witness after the witness testified. The appeal concerned the power of a trial chamber to carry out its judicial functions while conducting a fair and impartial trial, including its duty to ascertain the credibility of witnesses. The Appeals Chamber opined that the lawyer-client privilege does not cover Defense witness statements, and determined that, depending on the circumstances of each case, a trial chamber may order the disclosure of Defense witness statements after examination-in-chief of the witness.

Summary

The Appeals Chamber denied Tadić's appeals and granted the Prosecutor's cross-appeals, ultimately finding Tadić guilty on nine additional charges. In addition to the aforementioned appeals, the Defense also filed an appeal against Trial Chamber II's Sentencing Judgment for Tadić. The Appeals Chamber deferred this portion of the Defense's appeal, however, until the Appeals Chamber sentences Tadić on its new convictions.

International Criminal Tribunal for the former Yugoslavia (ICTY)

As of October 1999, the ICTY had current 25 public indictments against 66 individuals. Of the accused, 32 remain at large, 32 are in custody at the ICTY Detention Unit in The Hague, Netherlands, 2 of whom were released pending appeal, and 1 was released on bail to seek medical treatment; in addition, 6 accused have died and 18 indictments were withdrawn.

The ICTY, to date, has completed five trials on the merits (the Tadić Judgment, the Čelebići Judgment, the Furundžija Judgment, the Aleksovski Judgment, and the Jelisić Judgment). The ICTY also rendered one sentencing judgment (the Erdemović Judgment). The ICTY also completed the Blaškić trial on July 30, 1999, and the parties are awaiting judgment.

On May 24, 1999, the ICTY issued the Milošević *et al.* Indictment, bringing charges against Slobodan Milošević, Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, and Vlatko Stojiljković for alleged crimes committed in Kosovo between January and May 1999. Charged with personal and superior responsibility under 7(1) and 7(3) of the ICTY Statute (only Šainović is charged exclusively under 7(1)) for violations of Article 3 (violations of the laws or customs of war) and Article 5 (crimes against humanity) of the ICTY Statute, the Prosecutor alleged that they planned, instigated, ordered, committed, or otherwise aided and abetted in a campaign of terror, violence, destruction, and massacres directed at Kosovo Albanian civilians.



Villagers from Krisna Reka, Kosovo who were displaced by Yugoslav forces.

The five accused are charged jointly under four counts of the indictment: three counts of crimes against humanity for deportation, murder, and persecution, and one count of murder as a violation of the laws or customs of war. The indictment asserts that military and police forces, along with associated paramilitary units, engaged in a series of widespread and systematic attacks against towns and villages during which the Serbs forcibly expelled over 740,000 Kosovar civilians from Kosovo. In public statements, the Prosecution indicated that it is still examining evidence and expects to bring additional charges.

Progress on Arrests and Detentions

Since December 1998, six suspects were arrested on charges pending before the ICTY. The Croatian Government surrendered Vinko Martinović on August 9, 1999 and the Austrian Government surrendered Momir Talić on August 25, 1999. SFOR (NATO Stabilization Force) arrested in Bosnia the remaining four suspects: Dragan Kolundžija on June 7, 1999; Radislav Brdanin on July 6, 1999; Radomir Kovač on August 2, 1999; and Damir Došen on October 25, 1999. In addition, Dragan Gagović was killed by SFOR while resisting arrest on January 9, 1999.

Trial Chamber Judgments

Aleksovski Judgement

On May 7, 1999, Trial Chamber I of the ICTY announced its judgment in the case against Zlatko Aleksovski and, on June 25, 1999, rendered a written decision. The Prosecutor charged Aleksovski with two counts of grave breaches of the 1949 Geneva Conventions under Article 2 of the ICTY Statute (inhuman treatment, wilfully causing great suffering or serious injury to body or health), and one count of violating of the laws or customs of war under Article 3 of the ICTY Statute (outrages upon personal dignity). The Prosecutor charged Aleksovski under Article 7(1) of the ICTY Statute with individual criminal responsibility and Article 7(3) with superior criminal responsibility for his participation in the alleged offenses, and for his responsibility as a superior for the acts committed by military or civilian persons under his authority and control.

Trial Chamber I found Aleksovski guilty on one count of violating the laws or customs of war, and sentenced him to two years and six months imprisonment. Because Aleksovski had already

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spent 2 years, 10 months, and 29 days in detention, the Trial Chamber announced its verdict orally, rather than waiting for the written decision, and after pronouncing judgment, the Trial Chamber ordered Aleksovski immediately released, notwithstanding any appeal.

Trial Chamber I noted in its judgment that Articles 2 and 3 of the ICTY Statute apply only when the accused commits the alleged offenses in the context of an armed conflict and when there is a sufficient nexus between the offense and the armed conflict. Trial Chamber I interpreted the nexus requirement to mean that the accused perpetrated the act against the victim "because of" the conflict. The parties did not dispute that an armed conflict existed and that the offenses charged took place during the conflict.

In considering the charges of grave breaches of the 1949 Geneva Conventions under Article 2 of the ICTY Statute, the Trial Chamber was unable to agree on the applicability of Article 2 of the ICTY Statute with regards to the established facts. Relying on the Appeal Chamber's *Tadić* Jurisdiction Decision, Trial Chamber I noted that traditional interpretations of the grave breaches provisions require the conflict to be international in character. In a two-to-one decision in this issue, Judges Lal Chand Vorah and Rafael Nieto-Navia held that the conflict was not international at the relevant place and time, and that the victims were not "protected persons" within the meaning of Article 4 of the 1949 Fourth Geneva Convention. Therefore, Trial Chamber I found Aleksovski not guilty of violations of Article 2 of the ICTY Statute. Judge Almiro Simões Rodrigues dissented, believing that the evidence demonstrated the international character of the armed conflict.

In considering the remaining count, violating the laws or customs of war under Common Article 3 of the Geneva Conventions by committing outrages upon personal dignity, Trial Chamber I first discussed whether Aleksovski could be held responsible on the basis of both individual and superior criminal liability. The Chamber reviewed Aleksovski's behavior, position, authority over, and responsibility for the conditions and mistreatment within and outside the Kaonik prison facility. The Trial Chamber explained that, under Article 7(1) of the ICTY Statute, an accused person can incur individual criminal liability not only for crimes he/she perpetrates physically, but also for "crimes committed by others which he is said to have personally ordered, instigated or otherwise aided and abetted." Participation may occur before, during, or after the act is committed and need not be manifested through physical assistance, but moral support, encouragement, and sometimes mere presence are sufficient to incur liability if the actions have a significant effect on the crime. Under Article 7(3) of the ICTY Statute, the accused can incur criminal liability as a superior when he or she does not attempt to halt, prevent, or punish crimes committed by subordinates, when the accused has a means and a legal duty to do so.

Trial Chamber I found Aleksovski responsible for violating the laws or customs of war under both Articles 7(1) and 7(3) of the ICTY Statute for his participation, through acts and behavior, in crimes committed in the Kaonik prison facility, of which he was the commander (or warden). Under Article 7(3), the Trial Chamber found that the Prosecutor sufficiently established Aleksovski's superior-subordinate relationship over prison guards, but not over HVO (Croatian Defense Council) soldiers. Consequently, the Trial Chamber held that Aleksovski

could not be held responsible for crimes committed outside the Kaonik prison facility by HVO soldiers. The Trial Chamber did not clarify whether Aleksovski, as commander (or warden) of the Kaonik prison facility, was a civilian or military leader.

Trial Chamber I then considered Aleksovski's responsibility under Article 7(1) for violating the laws or customs of war under Common Article 3 for crimes committed in the Kaonik prison facility, either physically by the accused, or by ordering, instigating, or otherwise aiding and abetting in the crimes. It also considered Aleksovski's responsibility under Article 7(3) for crimes committed by persons under Aleksovski's control and authority.

Trial Chamber I found that the Prosecutor proved beyond a reasonable doubt that Aleksovski was individually responsible under Article 7(1) for the detention conditions and the hygiene, health, and welfare of the detainees. However, the Trial Chamber also held that, although the conditions did not meet international human rights standards, the Prosecutor did not adequately prove that Aleksovski failed to take measures incumbent upon and available to him, or that he deliberately ordered or allowed the poor conditions to arise, and therefore, he could not be held liable for violations of Common Article 3. As to the physical and psychological abuse committed in Kaonik prison facility, the Trial Chamber found that the violence that Aleksovski, and persons under his authority, inflicted constituted an outrage upon personal dignity, in particular, humiliating and degrading treatment within the meaning of Common Article 3. The Trial Chamber held that Aleksovski could be held responsible for this violence under Articles 7(1) and 7(3) of the ICTY Statute. Furthermore, the Trial Chamber found that the use of detainees as human shields or trench-diggers outside of the prison constituted an outrage upon personal dignity, and held Aleksovski responsible under Article 7(1) for aiding and abetting in these crimes.

Summary

Trial Chamber I held Aleksovski not guilty of the two counts for grave breaches of the 1949 Geneva Conventions and guilty of one count for violations of the laws or customs of war. The Trial Chamber held Aleksovski guilty of the violations under two theories of responsibility—individual responsibility (Article 7(1)) and superior responsibility (Article 7(3)). Judge Rodrigues attached a dissenting opinion about the applicability of the grave breach provisions. He determined that the Prosecutor established the international character of the conflict, even though it was his opinion that such characterization of the conflict is not a required element for Article 2 of the ICTY Statute to apply.

Jelisić Judgement

On October 19, 1999, Trial Chamber I rendered its judgment against Goran Jelisić. This trial was the first genocide trial held at the ICTY. The Prosecutor charged Jelisić, who called himself the "Serb Adolf," with one count of genocide, 12 counts of violating the laws or customs of war for murder, 3 counts of violating the laws or customs of war for cruel treatment, 1 count of violating the laws or customs of war for plunder, 12 counts of crimes against humanity for murder, and 3 counts of crimes against humanity for inhumane acts. The Prosecutor charged Jelisić with individual criminal responsibility under Article 7(1) of the ICTY Statute. On October 29, 1998, Jelisić pleaded not guilty to the genocide charge, but guilty to the remaining 31

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charges. The trial of Jelisić for the one count of genocide, alleging that Jelisić committed, or aided and abetted, in killing members of a group, ended with an acquittal. According to the Press Release, Trial Chamber I found that the Prosecutor failed to prove beyond a reasonable doubt that Jelisić acted with the intent to destroy, in whole or in part, the Bosnian Muslim population as a national, ethnic, or religious group, or that Jelisić had the clear knowledge that he was participating in the destruction, at least in part, of a given group.

For the Trial Chamber to accept Jelisić's guilty pleas on the 31 counts of war crimes and crimes against humanity, pursuant to Article 62 *bis* of the ICTY Rules of Procedure and Evidence, the Trial Chamber must be satisfied that the accused gave his guilty plea voluntarily, that his decision was informed and unequivocal, and that a sufficient factual basis existed for the crime and the accused's participation in the crime. Trial Chamber I determined that the evidence did not establish any doubt that Jelisić committed these crimes and agreed with the Prosecutor's legal qualification of the crimes as crimes against humanity and violations of the laws or customs of war. Trial Chamber I will issue a full written judgment and will determine the sentencing for the guilty pleas at a later date.

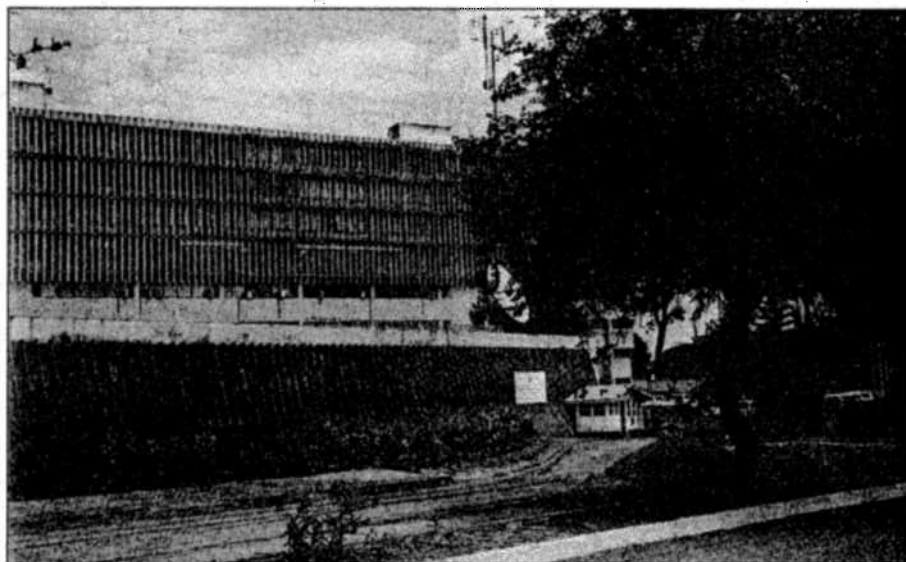
The International Criminal Tribunal for Rwanda (ICTR)

As of October 1999, the ICTR has issued 28 public indictments against 48 individuals, 37 of whom are in custody at the ICTR detention facility in Arusha, Tanzania, and 1 of whom is detained in Texas, United States. To date, the ICTR has rendered two judgments after trials on the merits: Trial Chamber I found Jean-Paul Akayesu guilty of genocide and crimes against humanity on September 2, 1998, and Trial Chamber II held Clement Kayishema and Obed Ruzindana guilty of genocide on May 21, 1999 (discussed below). The ICTR has also rendered two sentencing judgments: Trial Chamber I sentenced Jean Kambanda, who had pled guilty to genocide and crimes against humanity, on September 4, 1998, and also sentenced Omar Serushago, who had pled guilty to genocide and four of five counts of crimes against humanity, on February 5, 1999. The ICTR completed trials against Georges Rutaganda on June 17, 1999, and Alfred Musema on June 18, 1999, and they now await judgment.

On October 6, 1999, the ICTR approved the Butare joinder motion, allowing the joint trial against six defendants. The motion joins the trials of Joseph Kanyabashi, Elie Ndayambaje, Sylvain Nsabimana, Arsene Shalom Ntahobali, Alphonse Ntezirayo, and Pauline Nyiramasuhuko.

Progress on Arrests and Detentions

Since December 1998, seven suspects were arrested on charges pending before the ICTR. Eliezer Niyitegeka, the former minister of information, was arrested in Kenya on February 9, 1999, and Casmir Bizimungu, the former minister of health, was arrested on February 11, 1999, also in Kenya. Ignance Bagilishema, former *bourgmestre* of Mabanza, was arrested on February 20, 1999, in the Republic of South Africa. Jérôme



The International Criminal Tribunal for Rwanda in Arusha, Tanzania

Bicamumpaka, the former minister of foreign affairs, Justin Mugenzi, the former minister of commerce, and Prosper Mugiraneza, the former minister of civil service, were arrested in Cameroon on April 4, 1999. Mikaeli Muhimana (alias Mika), a former councilor in a section of Gishyita Commune, was arrested in Tanzania on November 8, 1999.

On March 18, 1999, Trial Chamber I allowed the Prosecutor to withdraw the indictment against Bernard Ntuyahaga, the former officer in charge of logistics at the Kigali military camp, and ordered Ntuyahaga's immediate release. After he was released, Tanzanian forces arrested Ntuyahaga and are considering a request for extradition from Rwanda, where he is wanted in connection with the killing of the Rwandan Prime Minister in April 1994.

On November 5, 1999, the *ad hoc* tribunals' joint Appeals Chamber ordered the release of Jean-Bosco Barayagwiza, a former foreign ministry official, held at the detention center in Arusha. Barayagwiza, who was arrested in Cameroon on March 27, 1996, and was transferred to the ICTR detention facility in February 1997, appealed his prolonged detention without trial. The Appeals Chamber ordered that the charges against Barayagwiza be dismissed with prejudice, and that he be returned to Cameroon (even though Cameroon is not a party to the Genocide Convention and may not extradite him to Rwanda). In response, the Rwandan Government suspended cooperation with the ICTR on November 6, 1999.

Trial Chamber Judgments

Kayishema and Ruzindana Judgement

On May 21, 1999, after the joint trial of Clement Kayishema and Obed Ruzindana, ICTR Trial Chamber II rendered the ICTR's second judgment after a trial on the merits. The trial against Kayishema, the former prefect of Kibuye Prefecture, and Ruzindana, a commercial businessman in Kigali, began on April 11, 1997, and adjourned on November 17, 1998. The Prosecutor charged Kayishema and Ruzindana under Articles 2 through 4 of the ICTR Statute with genocide, crimes against humanity, and violations of Article 3 Common to the Geneva Conventions (Common Article 3) and Additional Protocol II. Article 6(1)

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and 6(3) of the ICTR Statute grant the tribunal jurisdiction to prosecute persons responsible as individuals and as superiors.

The Prosecutor charged Kayishema with 24 counts of genocide, crimes against humanity, and violations of Common Article 3 and Additional Protocol II. In the indictment, counts 1 through 6 refer to the massacre at a Catholic Church and Home St. Jean Complex (Complex), counts 7 through 12 refer to the massacre at the stadium in Kibuye town (Stadium), counts 13 through 18 refer to the massacre at the Church in Mubuga (Church), and counts 19 through 24 refer to massacres committed in the area of Bisesero. The Prosecutor charged Ruzindana jointly with Kayishema under counts 19 through 24 for the Bisesero massacres, alleging six counts of genocide, crimes against humanity, and violations of Common Article 3 and Additional Protocol II.

Genocide

Trial Chamber II noted that before it can hold a defendant responsible for genocide, it must decide whether the accused had the intent to destroy, in whole or in part, a racial, ethnic, religious, or national group, by committing one of the prohibited acts specified in Article 2 of the ICTR Statute. The Trial Chamber focused on the acts of killing and/or causing serious bodily harm to members of a group, and determined that both Kayishema and Ruzindana did intend to destroy the Tutsi population by means of killing or seriously injuring them.

Trial Chamber II held that Kayishema instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, and execution of genocide by killing and causing serious bodily harm to Tutsis during the massacres at the Complex, Stadium, and Church. The Trial Chamber found him to be individually criminally responsible for the massacres under Article 6(1) of the ICTR Statute and responsible as a superior under Article 6(3). Furthermore, the Trial Chamber held that Kayishema and Ruzindana instigated, ordered, committed, and otherwise aided and abetted genocide in the preparation and execution of the massacre in the Bisesero area. The Trial Chamber held Kayishema individually responsible under Article 6(1) and responsible as a superior under Article 6(3), and Ruzindana individually responsible under Article 6(1) of the ICTR Statute.

Crimes Against Humanity (Murder, Extermination and Other Inhumane Acts)

Trial Chamber II stated that an accused can be accountable for committing the crime of extermination if the "actor participates in the mass killing of others or participates in the creation of conditions of life that lead to the mass killing of others, through his act(s) or omission(s); having intended the killing, or being reckless, or grossly negligent as to whether the killing would result and; being aware that his act(s) or omission(s) form part of a mass killing event; where, he [sic] act(s) or omission(s) forms part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds." Trial Chamber II stipulated the elements of other inhumane acts constituting a crime against humanity as follows: the accused must (1) commit an act of similar gravity and seriousness to the other acts enumerated in the ICTR Statute; (2) with the intention to cause the other inhumane act (whether against a witness or victim); and (3) with knowledge that the act is perpetrated within the overall context of the attack.

Trial Chamber II held that the elements necessary to conclude that the Defendants committed crimes against humanity

were found. In this case, however, the majority of the Trial Chamber held that the counts of crimes against humanity by means of extermination and murder, under the facts of this case, were "fully subsumed" by the counts of genocide. Therefore, Trial Chamber II did not convict Kayishema and Ruzindana for the crimes against humanity. Judge Tafazzal Hossain Kahn dissented on this point, noting the practice of the tribunals to deal with this issue during the sentencing phase, rather than during the merits phase. In addition, Trial Chamber II did not hold Kayishema and Ruzindana guilty of committing inhumane acts as crimes against humanity. The Trial Chamber acknowledged that the elements of the crime were satisfied, but the chamber rejected the Prosecutor's use of "inhumane acts" as a "catch all" category.⁸ It determined that the Prosecutor did not adequately particularize which pieces of evidence were supporting the charges, and therefore found the Defendants not guilty of crimes against humanity (other inhumane acts).

Violations of Common Article 3 and Additional Protocol II

For an act to breach Common Article 3 and Protocol II, the Trial Chamber stated that the following elements must be established, that: (1) the armed conflict in Rwanda at the time was of a non-international character, as defined in Protocol II; (2) there is a link between the armed forces and the accused; (3) the crimes must be committed *ratione personae*, on account of the person concerned and *ratione loci*, on account of the particular time and place; and (4) there must be a nexus between the armed conflict and the crime.

Trial Chamber II found Kayishema and Ruzindana, who were both civilians, not guilty of violations of Common Article 3 and Additional Protocol II because the Prosecutor failed to prove the accused were supporting the government efforts against the Rwandan Patriotic Front (RPF) and therefore they did not incur liability for their crimes under Article 4 of the ICTR Statute.

Summary

Trial Chamber II of the ICTR found Kayishema guilty on the four counts of genocide, and not guilty on the four counts of crimes against humanity and four counts of violating Common Article 3 and Additional Protocol II. The Trial Chamber rendered one guilty verdict against Ruzindana on the genocide count, and similarly held him not guilty on one count each of crimes against humanity and violations of Common Article 3 and Additional Protocol II. The ICTR sentenced Kayishema to life imprisonment and Ruzindana to 25 years imprisonment on May 21, 1999. Both parties appealed the decision.⁹

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