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## Updates from the International and Internationalized Criminal Courts

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## UPDATES FROM THE INTERNATIONAL CRIMINAL TRIBUNALS

### INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

#### TRIAL CHAMBER ORDERS INVESTIGATION OF THE PROSECUTOR IN ŠEŠELJ CASE

On June 29, 2010, Trial Chamber III of the International Criminal Tribunal for the Former Yugoslavia (ICTY) ordered an independent investigation into allegations of witness intimidation raised against the Office of the Prosecutor (OTP) in the case of Vojislav Šešelj. The Motion for Contempt, filed by Šešelj on March 23, 2007, alleges that ICTY prosecutors, Carla Del Ponte, Hildegard Uertz-Retzlaff, and Daniel Saxon, are responsible for, among other allegations, threatening, illegally paying, and blackmailing witnesses. Evaluating how the ICTY applies its rules of procedure in this case offers insight into the tribunal's developing jurisprudence on contempt of court proceedings, particularly those implicating the OTP.

Šešelj himself has been subject to allegations of witness intimidation. On July 24, 2009, Trial Chamber II convicted Šešelj of contempt for violating protective measures granted to witnesses, and sentenced him to fifteen months imprisonment. Trial Chamber II held that by disclosing information identifying three protected witnesses in a book published on his website, Šešelj violated Rule 77(A)(ii) of the ICTY Rules of Procedure and Evidence. His was the first contempt case tried at the ICTY against a defendant already on trial for war crimes. Prior to the conclusion of proceedings before the Appeals Chamber, on February 4, 2010, Trial Chamber II issued an order for additional contempt charges related to information in his book that potentially identifies eleven other protected witnesses. The Appeals Chamber upheld Trial Chamber II's decision in the initial contempt case on May 19, 2010. The second contempt case against Šešelj remains in the pre-trial stage.

Šešelj filed a motion for contempt against the OTP on March 23, 2007. The trial chamber stayed Šešelj's motion for contempt on May 15, 2007 to avoid delay of trial. Trial Chamber III reconsidered its

decision after hearing multiple witnesses testify to intimidation and pressure from the OTP during the prosecution's preliminary interviews. The trial chamber acted, *sua sponte*, to invoke Rule 77(C)(ii) of the ICTY's Rules of Procedure and Evidence, which states: "Where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings." The trial chamber directed the registrar to appoint an *amicus curiae* investigator to look into Šešelj's allegations and report back within six months.

Although the ICTY's system for investigating and adjudicating contempt of court in witness intimidation cases lacks the benefits of decades of refinement, its procedural rules provide a framework for addressing these allegations. Article 77 of the ICTY's Rules of Procedure and Evidence provides mechanisms for addressing witness intimidation perpetrated by any persons "who knowingly and willfully interfere with its administration of justice." The power to try contempt of court in the ICTY and other international criminal tribunals is derived from a tribunal's inherent power, an Anglo-American concept applied to international courts.

While Šešelj's case tested the ICTY's established process for holding contempt of court proceedings, the tribunal's procedure for investigating the OTP is a distinct practice. The trial chamber broke new ground by reconsidering Šešelj's motion against the OTP and initiating an investigation of the prosecutors. In the past, the ICTY has tried defendants, defense attorneys, witnesses, and the ICTY's former spokesperson for contempt using its standard procedure. However, this is the first time that the ICTY has ordered an *amicus curiae* to investigate a former Chief Prosecutor. This independent investigation has significant potential to shape international criminal jurisprudence if the trial chamber initiates

contempt proceedings against the OTP's Del Ponte, Uertz-Retzlaff, and Saxon.

#### BOSNIAN COURT UPHOLDS CROATIAN RULING AGAINST FORMER CROATIAN MP UNDER BILATERAL TREATY

On September 29, 2010, the Court of Bosnia and Herzegovina, a domestic court tasked with adjudicating war crimes, upheld a Croatian Supreme Court verdict sentencing Branimir Glavaš, a former major general in the Croatian Army and former Croatian Member of Parliament, to eight years in prison for war crimes. On May 8, 2009, a Croatian district court sentenced Glavaš to ten years in prison for the torture and killing of Serb civilians in his hometown of Osijek, Croatia during the 1990s Balkan conflicts. The Croatian Supreme Court later reduced his sentence to eight years' imprisonment. Immediately following his conviction, Glavaš reportedly left Croatia, fleeing to Bosnia where his dual citizenship protected him from extradition. Bosnian police arrested Glavaš on the basis of a bilateral treaty enacted by Bosnia and Croatia in February 2010, establishing mutual recognition of criminal judgments. The Glavaš decision is significant in that it demonstrates a policy shift among Balkan states towards cooperating to apprehend international fugitives. The current level of cooperation between these former Yugoslavian states is a far cry from the extradition difficulties the International Criminal Tribunal for the Former Yugoslavia (ICTY) encountered in the early days of its mandate.

Croatia, Bosnia, and Serbia have only recently established extradition and verdict recognition treaties. In the past, individuals convicted in the courts of one state often used their dual citizenship as a means to escape punishment in that state by fleeing to neighboring countries in which they have dual citizenship. For example, before upholding Croatia's ruling in the Glavaš case, Bosnia and Herzegovina denied Croatia's request to extradite Glavaš. On August 25, 2010, Croatia did extradite Sretko Kalini to Serbia based on an extradition agreement the two countries signed

in June. As a result of this cooperation, Kalini was convicted in absentia for the murder of Serbian Prime Minister Zoran Đinđić in 2003.

While the emergence of criminal justice treaties between these Balkan countries, such as that which led to the arrest of Glavaš, is a recent development, state cooperation with the ICTY in investigating and arresting indictees has been requisite for the functioning of the tribunal since its inception. The ICTY became operational while the Yugoslav conflicts were still ongoing, a time at which many political and military officials that would later be found guilty of war crimes were still operating with impunity. Croatia established its extradition treaty with the ICTY in 1996 during the presidency of Franjo Tuđman. Section IV of the Legislations Implementing the ICTY Statute addresses arrest and extradition of suspects to the tribunal and declares that an “investigative judge of the competent county court shall . . . decide on the Tribunal’s warrant for arrest of an accused,” essentially preserving Croatia’s power to decline an extradition request. However, while Tuđman facilitated transfers of Bosnian Croats to the tribunal, including Tihomir Blaškić and Zlatko Aleksovski in 1996, the Croatian government maintained that the ICTY lacked jurisdiction over Croatian military exercises conducted in Croatian territory. In her address to the UN Security Council in 2000, former Prosecutor Carla Del Ponte referred to Croatia’s cooperation in previous years as a “policy of obstruction and delay.” This view persisted until after Tuđman’s death in 1999 and the election of Ivo Sanader who, in 2004, facilitated the surrenders of Ivan Čermak, Tuđman’s Assistant Minister of Defense and Mladen Markač, a former Croatian Army general involved in Operation Storm, as well as several other Bosnian Croats.

Extradition between Balkan states and the ICTY has historically been a heavily politicized issue. As of 2001, part of U.S. aid to Serbia was conditional on Serbia’s cooperation with the ICTY. As Croatia, Serbia, and Bosnia and Herzegovina attempt to join the European Union (EU), other European states are making their support contingent on cooperation with the ICTY.

When deciding whether to extradite someone who is both a national hero and an alleged war criminal, governments

often stall for years before succumbing to external political pressure. In Croatia, Ante Gotovina maintains some popular support despite his alleged role in causing Serb civilian casualties during Operation Storm. Ratko Mladić, the former top-ranking general for the Republika Srpska, is regarded by many in Serbia as a national hero despite his alleged command responsibility for the Srebrenica genocide. Despite Serbia’s professed inability to capture Mladić, critics contend that Serbia has been stalling for years and has had several opportunities to capture him. Critics further allege that, as they did with the arrest of Radovan Karadžić, Serbia could continue to stall for years before succumbing to ICTY pressure. Some EU countries, such as the Netherlands, see the capture and extradition of Mladić by Serbia as a necessary factor in establishing Serbia’s cooperation with the ICTY. They demand proof of cooperation before supporting Serbia’s acceptance into the EU.

The Balkan states weigh different domestic interests in cooperating with each other than they do in cooperating with the ICTY. The recent trend toward bilateral cooperation is reflective of significant sociopolitical changes in the Balkans since the end of the conflict, and in response to criminals convicted in state courts finding impunity in bordering countries. Thus, countries resolved to end impunity out of mutual domestic interest. Distinctly, state cooperation with the ICTY involves states weighing domestic political interests against their desire to appeal to the international community. In the past, states often valued protecting national heroes and politicians accused of war crimes above international cooperation. For Serbia, Croatia, and Bosnia and Herzegovina, the economic benefits of joining the EU have created a significant incentive to cooperate with the ICTY. As such, increased cooperation with the ICTY in recent years and the upsurge in cooperation between Balkan states are motivated by different factors. Because different motivating factors support cooperation with the ICTY than support bilateral cooperation, the problems the ICTY initially faced in implementing extradition treaties are unlikely to be present in implementing bilateral cooperation.

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## INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

### SECURITY COUNCIL AMENDS ICTR STATUTE TO PROMOTE FULFILLMENT OF COMPLETION STRATEGY

On May 28, 2010, the President of the International Criminal Tribunal for Rwanda (ICTR), Judge Dennis Byron, submitted the tribunal’s biannual report, S/2010/259, to the UN Security Council detailing the ICTR’s recent progress and challenges in fulfilling its completion strategy. The ICTR recognized that a shortage of judges and staff has affected its ability to efficiently conduct fair trials and deliver timely judgments. In response to the ICTR’s report, the Security Council adopted Resolution 1932 (2010) to extend the terms of permanent and *ad litem* judges and amend Article 12 *ter* of the ICTR Statute. Amended Article 12 *ter* permits the Secretary-General to “appoint a former permanent or *ad litem* judge of the International Tribunal or of the International Tribunal for the former Yugoslavia [(ICTY)], to serve as an *ad litem* judge in the Trial Chambers for one or more trials.” Although the *ad litem* model is not ideal, a comparison of the remedies for *ad litem* judge shortages provided to the ICTY and ICTR demonstrates that the amendment of Article 12 *ter* reflects the Security Council’s desire to accelerate ICTR proceedings, and will likely be effective at this point in the ICTR’s history.

The Security Council originally permitted *ad litem* judges in the ICTY and ICTR so the tribunals could expedite fulfillment of their completion strategies. Daryl Mundis, Office of the Prosecutor Senior Trial Attorney at the ICTY, suggests that the adoption of completion strategies by the ad hoc criminal tribunals has resulted in the justification, in part, of policies that would otherwise not have been implemented. The creation of *ad litem* judge pools seems to be one such policy. Ideally, permanent judges would preside over all cases because they can most effectively preserve institutional memory, which is particularly important given the length and complexity of the tribunals’ cases. In comparison, *ad litem* judges may not provide the same level of continuity during and between cases. Nevertheless, the Security Council adopted the *ad litem* model in response to shortages of permanent judges, but shortages of *ad litem* judges ensued.

While the statutes of the ICTY and ICTR contain many similar provisions, the amended Article 12 *ter* of the ICTR Statute differs considerably from the comparable article of the ICTY Statute, Article 13 *ter*. In 2005, the Security Council amended the ICTY Statute to permit reelection of *ad litem* judges, a practice previously prohibited under Article 13 *ter* (1)(e). The amended ICTR Statute did not change the language of Article 12 *ter* to permit the reelection of *ad litem* judges. Instead, Article 12 *ter* (3) was added, which permits the Secretary-General to appoint a former ICTR or ICTY *ad litem* judge “if there are no *ad litem* judges remaining on the roster or if no *ad litem* judge on the roster is available for appointment, and if it is not possible to assign a judge currently serving at the International Tribunal . . . .”

The Security Council’s decision to add a paragraph to Article 12 *ter* of the ICTR Statute rather than amend its existing provisions was likely influenced by the near completion of the ICTR’s mandate. The ICTR aims to complete all trial proceedings by the end of 2011 and all appeals proceedings by the end of 2013, if no additional indictees are arrested. By contrast, the ICTY aims to render all judgments by the end of 2012. Anticipating a longer period during which the need to fill *ad litem* judge vacancies might arise, the Security Council amended the ICTY Statute in 2005 to permit the reelection, rather than appointment, of *ad litem* judges. However, the amendments to the ICTR Statute will likely apply for only two to three years. The language of Article 12 *ter* (3) removes the ICTR’s reliance on the nomination and election processes of *ad litem* judges as detailed in Article 12 *ter* (1). Under Article 12 *ter* (1), at least thirty-six judges must be nominated by Member States, from which eighteen judges are elected by the General Assembly. Article 12 *ter* (3) allows the ICTR to circumvent these requirements and thus, serves as an efficient mechanism for filling *ad litem* judge vacancies as they arise.

In his October 8, 2010 speech before the UN General Assembly Judge Byron stated, “the Tribunal’s achievements will be ultimately judged by the quality of its trials and judgments and by the efficiency of its judicial management.” While the *ad litem* model is not the most ideal long-term solution to judge shortages in international criminal tribunals, the amendment

to Article 12 *ter* of the ICTR Statute is an appropriate solution to the ICTR’s current *ad litem* judge shortage. In light of the Security Council’s clear desire to expedite ICTR proceedings, and the impending fulfillment of the tribunal’s completion strategy, the amended *ad litem* procedure will likely be effective.

#### APPEALS CHAMBER RESTRICTS IMMUNITY OF DEFENSE COUNSEL

On October 6, 2010, the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) issued a decision concerning the extent of immunity afforded to ICTR defense counsel. On May 28, 2010, Rwandan authorities arrested defense counsel Peter Erlinder for allegedly violating Rwanda’s genocide denial laws. Erlinder represents defendant Aloys Ntabakuze in the *Bagosora et al* case currently before the ICTR. Members of the international community protested Erlinder’s arrest, and other ICTR defense lawyers threatened to boycott proceedings before the tribunal. Ntabakuze filed a motion requesting that the Appeals Chamber of the ICTR order the Rwandan government to immediately release Erlinder and stop all proceedings against him. Also, in accordance with advice from the UN Office of Legal Affairs, the ICTR requested the Rwandan government to “formally assert immunity” for Erlinder, and to release him immediately, on the basis of the Convention on the Privileges and Immunities of the UN (CPIUN), to which Rwanda is a party. The High Court of Rwanda released Erlinder for health reasons on June 17, 2010, but ordered that investigations into his case continue.

In its October decision, the Appeals Chamber denied Erlinder full immunity from liability under Rwandan law, thereby permitting the Prosecutor General of Rwanda to continue its investigation. Although the Appeals Chamber’s decision limiting the immunity provided to defense counsel corresponds with the provisions of the CPIUN and the practices of other international courts, in practice, the decision raises challenges, particularly concerning possible infringements on the rights of the accused.

Section 22(b) of the CPIUN accords experts performing missions for the UN, including ICTR defense counsel, immunity from legal process “in respect of words

spoken or written and acts done by them in the course of the performance of their mission,” even after the termination of their employment on UN missions. ICTR defense attorney Kate Gibson suggests this clause can, and perhaps should be interpreted as granting blanket immunity from legal process to ICTR defense counsel in any country that is a signatory to the CPIUN. This broad interpretation is undesirable because of policy considerations such as the possible exploitation of the limitless protection under blanket immunity. Additionally, the purpose of granting counsel immunity is not to eliminate accountability for possible violations of national laws; rather, it is to ensure the smooth operation of the tribunal. As Section 20 of the CPIUN states, “immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves.”

Because it would not be tailored to serve the purposes of the UN mission, granting full immunity to defense counsel is not appropriate. However, restricting immunity raises challenges as well. In their Statement and Appeal to Rwanda, ICTR defense attorneys noted that Erlinder’s detention and prosecution “seriously compromises [their] missions by undermining [their] independence and by preventing the carrying out of [their] duties” at the ICTR. The *Bagosora et al* case is currently awaiting a hearing on appeal, for which all documents have been filed, but no date has yet been assigned. Therefore, Erlinder’s arrest did not prevent the other members of the defense team from carrying out their duties. However, in many other situations, the arrest of defense counsel would impede a defense team’s work on a case, especially at the pre-trial or trial stages. The defense counsel’s restricted ability to carry out his or her duties could infringe on the rights of the accused, as described in Articles 19 and 20 of the ICTR Statute, particularly the right to a fair and expeditious trial. Restricting defense counsels’ immunity from legal action could also be problematic if a state’s laws are not consistent with international norms. For instance, if an ICTR defense lawyer is arrested pursuant to a state’s domestic law that infringes on basic human rights, state sovereignty generally precludes the tribunal from compelling the state to release the lawyer.

The Appeals Chamber’s ruling reflects the general practice of international courts

to limit defense counsel's immunity from liability under national laws. Article 30 of the ICTY Statute is nearly identical to Article 29 of the ICTR Statute, both of which provide that immunities afforded to the judges, the Prosecutor, the Registrar, and related staff, of the tribunals are those included in the CPIUN. Additionally, Article 18(b) of the Agreement on

the Privileges and Immunities of the International Criminal Court incorporates provisions that are nearly identical to those included in Article VI Section 22(b) of the CPIUN, as discussed above. The case of Erlinder's arrest presented an international tribunal the first opportunity to clarify the boundaries of defense counsel immunity. Although the Appeals Chamber's deci-

sion reflects conventional international law and practice, restricting the immunity of defense counsel, nevertheless, remains controversial.

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## JUDGMENT SUMMARIES: INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

### JUDGMENT SUMMARY: *THE PROSECUTOR V. EPHREM SETAKO*, CASE NO. ICTR-04-81-T

On February 25, 2010, Trial Chamber I at the International Criminal Tribunal for Rwanda issued its judgment in *Prosecutor v. Ephrem Setako*. The indictment charged Setako with six counts: genocide or complicity in genocide; murder and extermination as crimes against humanity; and serious violations (violence to life and pillaging) of Article 3 Common to the Geneva Conventions and Additional Protocol II. The Trial Chamber found Setako guilty of genocide, extermination as a crime against humanity, and violence to life as a war crime and sentenced him to twenty-five years of imprisonment.

Setako was born in 1949 in Nkuli commune in the Ruhengeri prefecture of Rwanda. He began his career as a military officer and eventually obtained the rank of lieutenant colonel. After graduating with a degree in law in 1977, he began working with the Ministry of Defense in Kigali. Following the signing of the Arusha Accords in August 1993, Setako was appointed to head the Rwandan delegation of the Neutral Military Observers Group of the Organization of African Unity (NMOG). In 1994, he attained the level of head of the Division of Legal Affairs within the Ministry of Defense. According to the indictment, in this capacity, Setako participated in a meeting with several prominent national and local personalities for the purpose of planning and carrying out the extermination of Tutsis following the death of President Habyarimana on April 6, 1994. Setako's alleged involvement in the ensuing conflict included calling on militiamen to kill Tutsis and congratulating the killers afterwards. The Prosecution further asserted that in Kigali, Setako acted as the unofficial liaison officer to the prefecture's Interhamwe and, in that capacity, supplied

the group's members with weapons and contributed to looting throughout the city.

In its factual findings, the Trial Chamber determined beyond a reasonable doubt that Setako was involved in two separate instances of killing: the killing of thirty to forty Tutsis who had taken refuge at the Mukamira Military Camp on April 25, 1994, and the killing of nine or ten additional Tutsi refugees at the same camp on May 11, 1994. The Trial Chamber found that Setako, along with other prominent authorities, addressed a large gathering of recruits and other soldiers at the camp in Ruhengeri prefecture on April 25. According to one witness, Setako stated during his address that "Tutsis and their accomplices needed to be hunted down." Another witness testified that Setako "expressed surprise that Tutsis had taken refuge at the camp since they were being killed elsewhere." That night, some thirty to forty Tutsis living at the camp were shot. The Trial Chamber further found that Setako returned to the Mukamira camp on May 11, 1994 with approximately ten Tutsis and told an officer at the camp to kill them. That night, the ten captive Tutsis were killed.

The Trial Chamber determined that the accused ordered the crimes on both April 25 and May 11, 1994. The Trial Chamber held that Setako's position as a lieutenant colonel who hailed from the area provided him authority at the camp and that his speech calling for the killing of Tutsis on April 25, in addition to his instructions to kill the ten Tutsis he brought to the camp, established that he ordered the murders. The Trial Chamber further found that the proximity of the killings to Setako's actions at the camp on both dates indicated that his instructions substantially contributed to the killings. Lastly, the Trial Chamber determined that the "content of Setako's interventions" at the camp established that he acted with genocidal intent in relation to the killings. Accordingly, the Trial

Chamber found Setako guilty of genocide for ordering the killings on both April 25 and May 11, 1994. The Trial Chamber did not consider the second charge of complicity to commit genocide because it was alleged in the alternative.

On the charge of extermination as a crime against humanity, the Trial Chamber determined that the killings on April 25, 1994 were carried out as part of a broader, widespread or systematic attack against civilian Tutsis on the basis of their ethnicity. Furthermore, the Trial Chamber held that Setako's act of ordering the killing of thirty to forty refugees amounted to extermination, which is the act of killing "on a large scale." No charge of extermination as a crime against humanity was alleged with regard to the events of May 11, 1994.

Finally, in relation to the charge of violence to life as a war crime, the Trial Chamber found that the violence between the Rwandan armed forces and the Rwandan Patriotic Front constituted a non-international armed conflict during the period of time covered by the indictment. It further found that Setako and the assailants who committed the killings at Mukamira camp acted in furtherance of the existing armed conflict or under its guise. At the same time, the Trial Chamber found that the victims at Mukamira camp were civilians who had taken refuge with their family members at the camp and were not taking active part in the hostilities. Consequently, the Trial Chamber held Setako guilty of violence against life as a serious violation of Common Article 3 and of Additional Protocol II based on his order to kill the Tutsis at the camp.

The Trial Chamber dismissed the charges of murder as a crime against humanity and pillage as a war crime in relation to the events at Mukamira camp because the Prosecution failed to establish Setako's involvement beyond a reasonable doubt. The Trial Chamber also dismissed

the allegation that Setako bore responsibility for the killings at Mukamira camp, as well as other killings of Tutsis, on the basis of a joint criminal enterprise, because the Prosecution failed to present convincing evidence to demonstrate that Setako participated in any meetings or crimes other than the incidents at the Mukamira camp on April 25 and May 11, 1994. Similarly, the Trial Chamber dismissed allegations that Setako bore criminal responsibility as a superior for acts of Rwandan army soldiers, the local Hutu civilian population, and militia members, because the Prosecution presented insufficient evidence that Setako exercised effective control over the perpetrators of any crimes other than those that took place on April 25 and May 11, 1994. While the Chamber recognized that Setako's rank as lieutenant colonel in the Rwandan army indicated his influence and authority, his rank alone was insufficient to establish superior responsibility. Furthermore, the Trial Chamber found no evidence that Setako's position as the head of the division of legal affairs at the Ministry of Defense entitled him to legal authority over members of the armed forces or other segments of society, apart from his section at the Ministry. The Trial Chamber dismissed allegations of Setako's superior responsibility for the events at Mukamira camp because he was directly responsible for ordering the crimes, and it would be impermissible to enter convictions on both bases of responsibility for the same crimes.

In sentencing, the Prosecution argued that the Trial Chamber should impose a sentence of imprisonment for life because Setako played a prominent role in the crimes and abused his authority. In addition, the Prosecution claimed that Setako's offenses were grave and that there were no mitigating factors. The Defense requested that Setako be allowed the fullest benefit of mitigating factors reflected, including his lengthy public service to his country. The Trial Chamber concluded that although Setako's crimes were grave, his crimes did not merit the most serious sanction available under the Statute because the evidence did not show that Setako was a main architect of the majority of the crimes committed in Ruhengeri prefecture. Accordingly, the Trial Chamber sentenced Setako to a single sentence of twenty-five years of imprisonment.

*Zsofia Young, a J.D. candidate at the American University Washington College of Law, wrote this judgment summary for the Human Rights Brief. Susana SáCouto, Director of the War Crimes Research Office, and Katherine Anne Cleary, Assistant Director of the War Crimes Research Office, edited this summary for the Human Rights Brief.*

#### **JUDGMENT SUMMARY: THE CASE OF SIMON BIKINDI, CASE NO. ICTR-01-72-A**

On March 18, 2010, the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) rendered its judgment in the case of Simon Bikindi, who was sentenced by Trial Chamber III to a term of fifteen years imprisonment for direct and public incitement to commit genocide pursuant to Articles 2(3)(c) and 6(1) of the Statute of the Tribunal. The Trial Chamber based its conviction on evidence that Bikindi issued public exhortations to kill Tutsis on the Kivumu-Kayove road towards the end of June 1994. Bikindi is a former composer and singer, and previously worked at the Ministry of Youth and Association Movements of the Government of Rwanda. Bikindi appealed both his conviction and his sentence, requesting that his sentence either be overturned or reduced. The Prosecution also lodged an appeal against the Trial Chamber's sentence, arguing that Bikindi's conviction warranted life imprisonment. The Appeals Chamber ultimately dismissed all appeals from both the Prosecution and the Defense, affirming the Trial Chamber's sentence of fifteen years in prison.

The Appeals Chamber began by addressing Bikindi's fifth ground of appeal, which alleged that his prospects for acquittal suffered as a consequence of the "ineffective assistance" and "gross incompetence and/or gross negligence" of his defense counsel during the cross-examination of witness AKJ, a critical witness to the Prosecution's case. Pursuant to Article 20(4)(d) of the Statute, an accused retains the right to be represented by competent counsel. However, as the Appeals Chamber reiterated, all counsel working with the ICTR enjoy the presumption of competence, and thus the accused bears the burden of affirmatively demonstrating incompetence sufficient to occasion a miscarriage of justice. Furthermore, Article 19(1) of the Statute requires that the accused bring any alleged violation before the Trial Chamber. Failing

that, an accused must demonstrate that their counsel's incompetence was sufficiently manifest that the Trial Chamber was under a duty to intervene. Here, Bikindi failed to bring the alleged violation to the attention of the Trial Chamber, so he bore the burden of establishing on appeal that the Trial Chamber was obliged to intervene and failed to do so. However, based on the record, the Appeals Chamber concluded that Bikindi failed to meet this burden, and accordingly dismissed the appeal.

Next, the Appeals Chamber addressed Bikindi's first and second grounds of appeal, which related to alleged errors on the part of the Trial Chamber in relying on the testimony of two witnesses – witnesses AKK and AKJ – to reach its conclusion that the appellant made exhortations to kill Tutsis on the Kivumu-Kayove road. Specifically, Bikindi claimed error on the grounds that, *inter alia*, the Trial Chamber relied on certain portions of witness AKK's testimony, despite having found other portions of the same witness's testimony to be unreliable. In addition, Bikindi complained that the Trial Chamber improperly found the testimonies of the two witnesses corroborated each other, even though there were certain inconsistencies between the two testimonies. With regard to the first alleged error, the Appeals Chamber held that, as a general matter, "it is not unreasonable for a Trial Chamber to accept certain parts of a witness's testimony and reject others." Furthermore, the Appeals Chamber made clear, the Trial Chamber is not required to "set out in detail why it accepted or rejected particular parts of a witness's testimony." The Appeals Chamber also rejected the notion that the lower court erred in finding that the two witnesses' testimonies corroborated one another, recalling an earlier holding that "two testimonies corroborate one another when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or a sequence of linked facts." It is not necessary, the Chamber stressed, that the testimonies be "identical in all aspects or describe the same fact in the same way," as each witness presents what he observed from his particular view at the time of the relevant events. Overall, therefore, the Appeals Chamber found that a reasonable trier of fact could have relied on witnesses AKK's and AKJ's testimonies when deter-

mining Bikindi's culpability and dismissed these grounds of appeal.

Another grounds for appeal raised by Bikindi was that the Trial Chamber erred by failing to take judicial notice of several facts related to Operation Turquoise, a United Nations humanitarian operation. According to Bikindi, Operation Turquoise troops would have been on the very road allegedly used by Bikindi to guide the convoy from which he made his public exhortations to kill Tutsis on the Kivumu-Kayove road. The Appeals Chamber agreed with Bikindi that the Trial Chamber erred when it refused the Defense's request for judicial notice on the grounds that the request was not timely. However, the Appeals Chamber also determined that the relevant facts were not capable of being judicially noticed, and therefore the error of the Trial Chamber did not invalidate the decision.

Next, the Appeals Chamber turned to Bikindi's claim that the lower court erred in its assessment of evidence presented by the Defense. In particular, Bikindi submitted, *inter alia*, that the Trial Chamber made an "unequal choice of factors" in considering the close relationship between him and defense witnesses, while failing to consider that "a good proportion of these witnesses were Tutsi victims themselves" and had good reason to give evidence of Bikindi's guilt. However, the Appeals Chamber noted that the Trial Chamber enjoys broad discretion when assessing the weight of certain pieces of evidence. Furthermore, the Appeals Chamber was satisfied that the Trial Chamber fulfilled its duty to consider all relevant factors with regard to the credibility of the witnesses presented by the Defense. The Appeals Chamber similarly deferred to the discretion of the Trial Chamber in assessing Bikindi's sixth and final ground of appeal with regard to his conviction, namely that the Trial Chamber erred in concluding that Bikindi was an influential member of both the National Republican Movement for Democracy and Development and the *Interahamwe*, and that given his stature, Bikindi was fully aware of the impact of his public exhortations. According to the Appeals Chamber, it was fully within the Trial Chamber's discretion, as the primary trier of fact, to make findings as to Bikindi's perceived influence or authority, based on the totality of evidence presented.

Turning to the challenges from the Prosecution and Defense regarding the length of Bikindi's sentence, the Appeals Chamber began with Bikindi's claims that a sentence of fifteen years of imprisonment is disproportionate to the gravity of the offense, is manifestly excessive, and is unduly harsh. First, the Appeals Chamber noted that, although the Trial Chambers do have broad discretion in determining the appropriate sentence, Article 24 of the Statute nonetheless allows the Appeals Chamber to "affirm, reverse or revise" the sentence imposed, based on such factors as: (1) the gravity of the offense; (2) the individual circumstances of the convicted person, including any aggravating or mitigating circumstances; (3) the general practice regarding prison sentences in the courts of Rwanda; and (4) the extent to which any sentence imposed on the defendant by a court of any State for the same act has already been served. As a general rule, however, the Appeals Chamber affirmed that it will not challenge an imposed sentence in favor of its own unless it had been demonstrated that the Trial Chamber committed a discernible error in exercising its discretion, or failed to follow the applicable law. The burden is on the appellant to affirmatively establish the error. For his part, Bikindi contended, *inter alia*, that the offense for which he was convicted should not be considered a crime of similar gravity to genocide and thus warranted a lighter sentence. According to Bikindi, the sentence he received reflects a determination that the two offenses have been placed on the same footing. The Appeals Chamber, however, explained that there is no "hierarchy of crimes" within the jurisdiction of the Tribunal and that each sentence is imposed on a case-by-case basis after considering the unique circumstances at play. Bikindi also argued that, absent established standards of sentencing, the practices of other international tribunals or national courts should be considered. According to Bikindi, within those jurisdictions, there is an emerging trend to treat the crime of incitement to genocide as an offense less severe than the crime of genocide. However, the Appeals Chamber noted that, pursuant to Article 23 of the ICTR Statute, the Trial Chamber was not obliged to consider the practices of other jurisdictions other than Rwanda, which does not treat direct and public incitement to genocide more leniently than the crime

of genocide. Lastly, Bikindi requested that the Appeals Chamber consider mitigating factors, particularly that Bikindi composed songs promoting peace and that he had in the past provided assistance to Tutsis. With respect to the first factor, the Appeals Chamber found that other compositions were indisputably used to spread Hutu Power ideology and rally perpetrators to take action. With respect to the second factor, the Appeals Chamber found that Bikindi's assistance was selective at best, and that he only provided assistance to those in his inner circle.

As for the Prosecution's appeal seeking an increase in the sentence to life in prison, the Appeals Chamber held that the Prosecution failed to establish that the fifteen-year sentence was manifestly inadequate given the particular circumstances of Bikindi's offense, and thus it affirmed the sentence imposed by the Trial Chamber.

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**JUDGMENT SUMMARY: SIMÉON NCHAMIHIGO V. THE PROSECUTOR, CASE NO. ICTR-2001-63-A**

On March 18, 2010, the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) issued a judgment on an appeal by Siméon Nchamihigo. Nchamihigo – a former deputy prosecutor from Cyangugu prefecture – appealed his conviction issued by Trial Chamber III (Trial Chamber) on November 12, 2008. The Trial Chamber convicted Nchamihigo of genocide, murder as a crime against humanity, extermination as a crime against humanity, and other inhumane acts as a crime against humanity, and sentenced Nchamihigo to life imprisonment. Nchamihigo appealed the conviction on 36 grounds. Upholding nine of Nchamihigo's grounds for appeal, the Appeals Chamber partially vacated the Trial Chamber's findings and reduced Nchamihigo's life sentence to a prison term of forty years.

Several of Nchamihigo's successful appeals related to the Trial Chamber's reliance on the testimony of particular prosecu-

tion witnesses, whose credibility had been challenged by the defense. For instance, Nchamihigo persuaded the Appeals Chamber of the insufficiency of the Trial Chamber's reliance on the evidence of one witness to establish that Nchamihigo aided and abetted the killing of three Tutsi girls at the Gatandara roadblock. Specifically, according to the defense, the Trial Chamber improperly relied upon the uncorroborated testimony of Witness BRD, in spite of the fact that BRD was previously convicted for forgery and despite documentary evidence that challenged a key portion of the witness's testimony. A majority of the Appeals Chamber agreed, holding that the lower court abused its discretion in the assessment of BRD's credibility. Additionally, the Appeals Chamber found that the Trial Chamber drew conclusions that "so exceed[ed] the evidence" that they called into question the reasonableness of the Chamber's inference that the accused played a role in the murders. Based on these errors, the Appeals Chamber quashed Nchamihigo's convictions for genocide and murder as a crime against humanity to the extent the convictions were based on these three murders.

Notably, Judges Pocar and Liu dissented from the Appeals Chamber's holding, recalling that it is fully within the Trial Chamber's discretion to determine the appropriate weight to be accorded to a witness's testimony. They asserted that a Trial Chamber may consider a number of factors in assessing credibility, including the witness's demeanor while testifying, his role in the event in question, the plausibility and clarity of his testimony, inconsistencies between the testimony and other evidence, prior examples of false testimony, a motivation to lie, and the witness's responses under cross-examination. Noting the Trial Chamber's findings that Witness BRD testified "in a forthright manner" and "stood firm under cross-examination," the dissenting judges contended that the Trial Chamber exercised due care in assessing the witness's credibility, and therefore the Appeals Chamber must defer to its findings.

The Appeals Chamber rejected a general challenge by the defendant to the Trial Chamber's reliance on uncorroborated accomplice testimony. After looking

to the practice of other international criminal tribunals, including the International Criminal Tribunal for the former Yugoslavia and the Special Court for Sierra Leone, as well as domestic courts, the Appeals Chamber held that the Trial Chamber has the discretion to rely on uncorroborated, but otherwise reliable, testimony from any witness, including accomplices, so long as the Chamber treats accomplice evidence with the necessary caution. According to the Appeals Chamber, the "main question" in evaluating the reliability of accomplice evidence is "whether the witness concerned might have motives or incentives to implicate the accused."

However, Nchamihigo successfully argued that the Trial Chamber erred in relying on the uncorroborated testimony of Witness BRK – an alleged accomplice to Nchamihigo's crimes – to support findings underlying the appellant's convictions for genocide and extermination as a crime against humanity. The Appeals Chamber began its analysis by reiterating that, while accomplice testimony "is not *per se* unreliable," in assessing the probative value of such evidence, "the Chamber is bound to *carefully* consider the totality of the circumstances in which it was tendered." The Appeals Chamber found that the Trial Chamber failed in its assessment of the credibility of BRK's evidence. Particularly unsettling for the Appeals Chamber was evidence that BRK awaited trial on charges pertaining to his involvement in the same incidents, suggesting BRK may have an incentive to minimize his own involvement and to place blame upon Nchamihigo. Moreover, BRK was not at first forthright in his testimony, and at trial he contradicted his previous written statement about the timing of the incidents in question. Based on these factors, the Appeals Chamber found that "no reasonable trier of fact could have found Witness BRK to be credible." Judge Pocar dissented on account of his belief that the Trial Chamber exercised due deference in its finding that the witness's evidence was credible.

Witness credibility was not the only reason that the Appeals Chamber granted Nchamihigo's appeals. For instance, the Appeals Chamber overturned his conviction for instigating killings in Shangi parish

because the indictment did not provide Nchamihigo with sufficient notice of the charges against him. Paragraph 20(a) of the indictment accused Nchamihigo of supplying weapons to *Interahamwe* members en route to kill Tutsis in Shangi parish. The Appeals Chamber held that the Prosecutor failed to prove this allegation, succeeding only to establish that Nchamihigo "provided hospitality and encouragement to them by nourishing them the night before the attack." The Appeals Chamber noted that the indictment must announce charges against the defendant with sufficient particularity, and that the Prosecutor is bound at trial by the specific facts that he or she alleges in the indictment. Thus, the Appeals Chamber held that Nchamihigo "could not have known on the basis of paragraph 20(a) of the Indictment that he was being charged with instigating [the] *Interahamwe* to kill Tutsis at Shangi parish by providing them with hospitality and encouragement the night before the attack."

Lastly, the Appeals Chamber found error in the Trial Chamber's finding that the appellant instigated killings in Hanika parish. Witness testimony established conflicting accounts of Nchamihigo's whereabouts on April 11 and 12, 1994, when the massacre occurred. The Trial Chamber adopted an interpretation of the testimony that placed Nchamihigo in the parish at critical times during those two days, and convicted him of instigating the massacre. The Appeals Chamber emphasized that the Trial Chamber has broad discretion for making factual determinations at the trial level, but criticized the Trial Chamber for not providing an adequate explanation of its reasoning. The Appeals Chamber explained that this deficient explanation impeded the process of judicial review, and required a reversal of the conviction as a result.

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## INTERNATIONAL CRIMINAL COURT

### KENYANS QUESTION ICC AUTHORITY

On September 18, 2010 Kenyan Cabinet Minister Mutula Kilonzo questioned the International Criminal Court's (ICC) right to investigate and prosecute Kenyan nationals for crimes committed during the post-election violence. Days later, Kenyan businessman Joseph Gathungu claimed that allowing the ICC to launch an investigation would violate the country's newly-ratified constitution. While both Kilonzo and Gathungu assert that the new constitution provides mechanisms sufficient to carry out such an investigation, the ICC has already determined that Kenya's prior inaction shows an unwillingness to do so.

The assertions come in the wake of the ICC's March 31, 2010 decision to initiate an investigation into crimes against humanity allegedly committed in the Republic of Kenya. The decision marked the first time that the ICC prosecutor initiated an investigation *proprio motu* (by one's own motion) under Article 15 of the Rome Statute. Upon reviewing Prosecutor Luis Moreno-Ocampo's submission, a majority from Pre-Trial Chamber II found that the Prosecutor's request met the "reasonable basis to proceed" set forth by Article 15(3) of the Rome Statute. On September 21, 2010 the Prosecutor announced plans to present two cases "against 4 to 6 individuals who according to the evidence, bear the greatest responsibility for the most serious crimes committed during Kenya's 2007-2008 post election violence."

Through its recent refusal to arrest Sudanese President Omar al-Bashir, accused of committing genocide, war crimes, and crimes against humanity, Kenya challenged the authority of the ICC. Kenya's failure to arrest Bashir is a direct violation of the Rome Statute, the treaty that established the ICC. Kenya invited Bashir to attend the ceremony and subsequent celebrations accompanying the ratification of the Kenyan constitution on August 27, 2010.

Kilonzo's argument addresses the foundation of the ICC's jurisdiction to launch an investigation within Kenya. Regarding the ICC's upcoming investigation, Kilonzo stated: "[W]e can say that Kenyan judges meet the best international standards. After that, I can even tell them not to admit the ICC case. Why on earth should a

Kenyan go to The Hague?" This argument implicitly references Article 17 of the Rome Statute pertaining to admissibility. According to Article 17(1)(a), the ICC will determine that a case is admissible if "the State is unwilling or unable genuinely to carry out the investigation or prosecution."

Kilonzo's statement implies that Kenya is able to carry out an investigation or prosecution. In order to effectively challenge the ICC's jurisdiction, Kilonzo would have to demonstrate that Kenya can fulfill both the willing and able conditions, which may be unlikely given Kenya's lack of cooperation with the ICC to date. Even this could prove fruitless, as the Pre-Trial Chamber, in their March 2010 decision, cited the Appeals Chamber, which said, "in case of inaction, the question of unwillingness or inability does not arise." Even if he were able to convince the Pre-Trial Chamber that Kenya is capable of carrying out an investigation, Kilonzo must still illustrate Kenya's willingness to do so.

Pursuing another avenue for legal action, Gathungu filed a lawsuit before Kenya's High Court in which he stated that Kenya's new constitution does not allow the ICC to conduct an investigation in Kenya. His application goes on to say that, because the ICC is not provided for in Kenya's Constitution, the court cannot investigate crimes, or determine the guilt of alleged criminals in Kenya. Gathungu's argument may find its genesis in Article 159(1) of the Constitution of Kenya, which states: "Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution."

Gathungu's assertion, however, is not supported by a more thorough reading of Kenya's constitution. Article 2(6) of the Constitution of Kenya provides: "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution." Because the Republic of Kenya ratified the Rome Statute on March 15, 2005, Article 2(6) of the Constitution requires that Kenya accept the ICC's jurisdiction. Also, the Rome Statute provides rules with regard to the ICC's jurisdiction over States Parties. Article 4(2) indicates that "The Court may exercise its functions and powers . . . on the territory of any State Party . . ." Similarly, Article 12(1) states: "A State which becomes a Party to this Statute thereby accepts the

jurisdiction of the Court with respect to the crimes referred to in article 5." In addition, Article 86 provides: "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."

The legal basis for Kilonzo's argument, as well as Gathungu's, is questionable. Kilonzo's challenge does not address Kenya's failure to initiate an investigation or prosecution, while Gathungu's does not comport with either to the Constitution of Kenya or the Rome Statute. Perhaps these arguments serve as an expression of concern regarding the Prosecutor's unprecedented use of *proprio motu*, or greater overarching concerns with the ICC, but they do not express sufficient reasons to preclude the ICC from continuing its investigation of Kenya's post-election violence.

### ICC APPEALS CHAMBER REVERSES LUBANGA RULING

On October 8, 2010, the Appeals Chamber of the International Criminal Court (ICC) reversed Trial Chamber I's July 8, 2010 decision to stay proceedings in *The Prosecutor v. Thomas Lubanga Dyilo*, as well as the Trial Chamber's July 15, 2010 decision to release the accused. By doing so, the Appeals Chamber may have begun to establish a precedent that sanctions are the appropriate mechanism to deal with the misconduct of an officer of the court, rather than ordering a stay of proceedings. The Chamber also decided that Article 71 of the Rome Statute is sometimes preferable to Articles 46 and 47 when sanctioning a prosecutor, in spite of Articles 46 and 47's explicit references to prosecutors.

Trial Chamber I ruled that a fair trial was no longer possible because Prosecutor Luis Moreno-Ocampo failed to adhere to the Chamber's orders to disclose the identity of intermediary 143 to Lubanga Dyilo once protective measures were employed. The Chamber later observed, "the accused cannot be held in preventative custody on a speculative basis," and ordered him released. The prosecutor appealed both orders.

In its decision, the Appeals Chamber found that Trial Chamber erred by resorting to a stay of proceedings, adding that because the Trial Chamber's decision to release Lubanga Dyilo was based on the

erroneous decision to stay proceedings, the decision to release the accused also had to be reversed. The Appeals Chamber explained that if there is a “conflict between the orders of a Chamber and the Prosecutor’s perception of his duties, the Prosecutor is obliged to comply with the orders of the Chamber.”

The Appeals Chamber noted that the Trial Chamber’s order to stay proceedings was premature, and that sanctions as provided under Article 71 of the Rome Statute were the proper mechanism by which a Trial Chamber could maintain control of proceedings. Article 71(1) allows the court to “sanction persons present before it who commit misconduct,” through means provided in the Rules of Procedure and Evidence.

The Appeals Chamber’s decisions may have contributed to the establishment of a significant precedent: the Chamber is likely to require an exhaustion of sanctions before ordering a stay of proceedings. One implication is that the outcome of a trial before the ICC may not be directly affected by the misconduct of an officer before the court. This promotes the idea that some matters of internal discipline — disciplinary measures taken against officers of the

court — at the ICC can be treated independently from the Chamber’s decisions regarding the outcome of a trial. Even if disciplinary measures lead to a prosecutor’s removal from the courtroom (or perhaps from the position itself), the Appeals Chamber’s ruling indicates that this would be preferable to a stay of proceedings predicated on a prosecutor’s misconduct.

The Appeals Chamber may have also set a controversial precedent with its decision to look to Article 71 to sanction the Prosecutor. It is unclear whether Article 71 applies to the prosecutor in the first place. Otto Triffterer’s *Commentary on The Rome Statute* explains:

Persons present *before* the Court in the sense of [A]rticle 71 are all those not belonging to one of the organs of the Court . . . . This narrow interpretation is confirmed by the fact that articles 46 and 47 provide specific sanctions for misconduct of Judges, Prosecutors and members of the Registry . . . . Persons of these three groups are *protected* by [A]rticle 71, however . . . do not fall under [A]rticle 71 when committing a misconduct. (Page 1351, *Commentary on the Rome Statute*)

It appears that Triffterer draws an appropriate distinction between Article 71 and Articles 46 and 47, given that the former makes no specific mention of the prosecutor. In looking to Article 71, the Appeals Chamber may have unnecessarily complicated the process of sanctioning the prosecutor.

By choosing not to apply Articles 46 and 47, the Appeals Chamber may have created more confusion than clarity on the issue of sanctioning an officer of the court. It now seems unclear when it would be appropriate to use Articles 46 and 47. The distinction between Articles 46 and 47 and Article 71 does not lie in the magnitude of the offense, as both sets of articles have provisions for breaches of both a severe and less serious nature. Equally significant is the fact that the range of penalties for misconduct has been greatly widened, making it more difficult to mete out appropriate disciplinary measures. The court could find itself deciding these matters in future cases.

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