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Updates from the International and Internationalized Criminal Courts

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UPDATES FROM THE INTERNATIONAL CRIMINAL TRIBUNALS

INTERNATIONAL CRIMINAL COURT

KENYA CONTINUES TO SEEK DEFERRAL IN ICC CASES

Kenya has lost its latest bid to defer two cases against former government officials currently pending before the International Criminal Court (ICC). On May 30, 2011, ICC Pre-Trial Chamber II rejected the Kenyan Government's challenges to the admissibility of the cases under Article 19 of the Rome Statute. The concurrent judgments from the Chamber stated that the Government's challenge "did not provide concrete evidence of ongoing proceedings before national judges," as required by Article 17's admissibility standards. The judgment is the latest setback for the Kenyan Government that has been struggling for months in multiple settings to defer the ICC's prosecution of six of its government officials accused of international crimes that took place following the 2008 presidential elections.

In February 2011, Kenyan President Emilio Mwai Kibaki met with 23 Kenyan envoys to develop strategies to convince the United Nations (UN) to defer the pending cases. Article 16 of the Rome Statute states that an investigation or prosecution may be deferred for a period of twelve months if a "resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect"

For the Security Council to adopt a Chapter VII resolution, however, it must determine that if an investigation or prosecution were to proceed, such actions could result in a threat to international peace and security. Several countries have expressed their doubts as to the validity of such an argument. The United States Ambassador to Kenya, Michael Ranneberger, stated publicly that the United States would likely veto Kenya's request for a deferral of the two cases presently before the Court if it were submitted for a vote to the UN Security Council. British High Commissioner to Kenya Rob Macaire shared a similar sentiment. During an informal interactive dialogue between

Kenya and the Security Council on March 18, Kenya made its Article 16 argument, but members of the Council generally agreed that the situation in Kenya does not amount to a threat to international peace and security, and that the ICC would be the best venue for Kenya to challenge admissibility. Following Kenya's official application to the UN for deferral, the UN Security Council failed to reach any agreement during an April 9 meeting — in essence defeating Kenya's application. Without credible evidence that the investigation would lead to unrest, it is difficult to imagine that the Security Council would be willing to interfere with the ICC's jurisdiction, as doing so would severely undermine the Court's authority.

Kenya's clearest path to a termination of the ICC case was thought to be by appealing directly to the ICC rather than the Security Council. Kenyan officials continue to argue that the ICC is a "court of last resort," and that under the principle of complementarity, there should be no investigation unless Kenya does not make a genuine effort to set up a local judicial process to investigate or try the accused. Article 53(4) of the Rome Statute provides that "[t]he Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information." Kenya filed its application challenging the admissibility of the cases before the ICC on March 31 and asserted that it is capable of investigating the alleged crimes. While it was thought that the Kenyan Government's best hopes lied with the discretion of the ICC, the recent decision rejecting the Government's assertions makes a deferral increasingly unlikely.

Failing to show that Kenya is able *and* willing to conduct an investigation, a final option might be an amendment to Article 16 of the Rome Statute, as proposed by the African Union (AU) in November 2009. The amendment proposes to allow the UN General Assembly authority to defer an investigation should the Security Council fail to act on such a request. This proposed amendment, however, is unlikely to garner the support it needs to pass. Aside from altering the Rome Statute, this amendment would require that the

Security Council cede more authority to the General Assembly — something it has not been historically willing to do since the formation of the UN. During the Sixteenth Ordinary Session of the AU, the Assembly called upon African States Parties to the Rome Statute of the ICC to join together "to ensure that the proposal for amendment to Article 16 of the Rome Statute is properly addressed during the forthcoming negotiations and to report to the Assembly through the Commission." Even if a united front of African States Parties supported this amendment, however, it is not clear that they could effect a change. A threat to depart from the Assembly of States Parties to the Rome Statute would not necessarily be effective, as the ICC would be reluctant to set a precedent by acquiescing to such demands. Additionally, withdrawal from the ICC's jurisdiction does not take effect for one year from the moment of notification and has no bearing on cases initiated prior to withdrawal.

The Government of Kenya may, by June 5, 2011, file an appeal against the ICC Pre-Trial Chamber decisions, in accordance with article 82(1)(a) of the Rome Statute and rule 154.1 of the Rules and Procedure and Evidence. At the time of this writing, no additional appeals to the Security Council or the ICC have been filed.

ICC OPENS INITIAL CASE IN LIBYAN SITUATION

On March 3, 2011, International Criminal Court (ICC) Prosecutor Luis Moreno-Ocampo (the Prosecutor) announced the opening of an investigation into possible crimes against humanity committed from February 15, 2011, onwards by Libyan "Security Forces." The investigation comes as a result of Security Council Resolution 1970 (2011), which highlights the "grave concern at the situation in the Libyan Arab Jamahiriya and condemn[s] the violence and use of force against civilians." The resolution, which was adopted on February 26, referred the situation to the ICC. Security Council referral under Chapter VII of the United Nations is the only way that the ICC is given jurisdiction to proceed with an inves-

tigation in situations that do not include States Parties to the Rome Statute.

On May 4, 2011, the Prosecutor issued an initial report to the UN Security Council indicating that the number of dead since February 15 is “in the thousands.” The report reveals that the “available information provides reasonable grounds to believe that crimes against humanity have been committed and continue being committed in Libya.”

Following the Security Council report, on May 16 the Prosecutor filed an application for arrest with ICC Pre-Trial Chamber I to issue arrest warrants against Muammar Abu Minya Gaddafi, Saif Al Islam Gaddafi and the Head of the Intelligence Abdullah Al Senussi for crimes against humanity committed in Libya since February 2011. Specifically, the application charges that Muammar Gaddafi “conceived and implemented, through persons of his inner circle such as his son Saif Al Islam Gaddafi and Abdullah Al Senussi, a plan to suppress any challenge to his absolute authority through killings and other acts of persecution” executed by Libyan Security Forces. Article 7 of the Rome Statute of the ICC provides that a “crime against humanity” means, among other acts, murder, extermination, rape, and torture “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” As the first case brought in the Libyan situation, the application explicitly states that the initial charges are only for crimes against humanity committed against civilians and do not include war crimes committed during the armed conflict that started at the end of February.

If allegations that security forces have attacked peaceful demonstrators en masse are accurate and unambiguous links to those in control are established, the case for crimes against humanity, as charged in the Prosecutor’s initial filings, appears clear. The situation becomes much murkier, however, if the Prosecutor decides to bring additional charges relating to war crimes under Article 8 of the Statute that may have been committed after the start of the armed conflict. The initial Security Council report indicates that there is information indicating attacks against civilians not taking a direct part in hostilities have taken place, as well as attacks directed “against buildings dedicated to religion, education, art, sci-

ence or charitable purposes,” which would meet Article 8 definitions of triable war crimes.

One of the first challenges, however, will be determining whether those killed in Libya are accurately described as civilians. The Prosecutor has said that Libyan authorities decided that they were willing to kill unarmed protestors opposing Libyan leader Muammar Gaddafi’s rule even before the conflict began. International Committee of the Red Cross (ICRC) director-general Yves Daccord has stressed that attacks directly targeting civilian populations are prohibited by international humanitarian law. However, Libyan government officials will likely argue that many of those referred to as civilians, in fact, do not qualify as non-combatants. Civilians who directly participate in hostilities (DPH) lose their protected status under the Geneva Conventions, and can be legitimately targeted according to international humanitarian law. However, DPH is not explicitly defined within international law and remains the subject of constant debate between states and international organizations. It is also possible that civilians who have taken up arms in rebellion could be considered freedom fighters, or combatants seeking the independence of a country, a protected class under the Geneva Conventions.

A final defense for those accused of war crimes within the Libyan conflict may be to seek a defense through Article 31(c) of the Rome Statute. Article 31(c) provides that a person will not be criminally responsible if, during their conduct:

The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected

The defense under Article 31(c) could be argued concurrent with assertions of DPH. If a significant number of civilians could instead be labeled as combatants, it would be far easier for Libyan heads of state to argue that their attacks were essen-

tial for accomplishing a military action, such as quelling an uprising.

The Prosecutor has stated that investigations are proceeding in the Libyan situation but, to date, has not brought any charges relating to war crimes. Pre-Trial Chamber I must now decide whether to accept the Prosecutor’s request, reject it, or ask the Office of the Prosecutor for more evidence.

Slava Kuperstein, a J.D. candidate at the Washington College of Law, covers the International Criminal Court for the Human Rights Brief.

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

TRIAL CHAMBER TO ALLOW EVIDENCE OUTSIDE TEMPORAL JURISDICTION OF ICTR

On February 3, 2011, in *Ngirabatware*, Trial Chamber II of the International Criminal Tribunal for Rwanda (ICTR) denied the Defence Motion to Exclude Evidence Falling Outside the Temporal Jurisdiction of the Tribunal. The jurisdiction of the ICTR is limited to crimes committed in 1994. The defense sought to exclude testimony from three prosecution witnesses that shows the accused allegedly attended meetings in 1993 at which attacks against Tutsis were planned. Although consideration of evidence outside the tribunal’s temporal jurisdiction is controversial, the Trial Chamber appropriately denied the motion because it ultimately has the discretion to consider such evidence when it is relevant and has probative value.

During negotiations establishing the ICTR, Rwanda proposed that the jurisdiction of the tribunal encompass not only the April 1994 genocide, but also its related causes stemming from the beginning of the armed conflict in 1990. The UN Security Council rejected this proposition on the basis that applying Chapter VII powers to extend the jurisdiction of the tribunal to 1990 would be inappropriate because the armed conflict prior to 1994 was not a sufficient threat to international peace and security. However, pursuant to Rule 89(C) of the Rules of Procedure and Evidence, the tribunal can “admit any relevant evidence which it deems to have probative value,” even if such evidence

concerns events falling outside the temporal jurisdiction of the ICTR.

While the defense in *Ngirabatware* recognized the Trial Chamber's power to consider evidence outside the temporal jurisdiction of the ICTR, it argued that the evidence at issue did not fulfill any of the purposes articulated by the Appeals Chamber in *Nahimana* for considering such evidence. In *Nahimana*, the Appeals Chamber held that a Trial Chamber could admit evidence concerning events outside 1994 if, for example, it clarifies a given context, establishes by inference the elements of criminal conduct occurring in 1994, or demonstrates a deliberate pattern of conduct. The prosecution argued that the witness testimony concerning the 1993 events demonstrates a deliberate pattern of criminal conduct in planning attacks against Tutsis that continued into 1994, but the defense asserted that the evidence did not demonstrate such a pattern and should therefore be excluded. The Trial Chamber ultimately held that the purposes listed in *Nahimana* were illustrative but not exhaustive. However, the defense also argued that evidence capable of establishing independent crimes should be excluded because it may lead to convictions *per se*, such as an automatic conviction based on the accused's mere presence at meetings.

It has been suggested that admitting evidence outside the temporal jurisdiction gives the tribunal a way to exercise jurisdiction over crimes beyond those permitted by its statute. This possibility should be of concern to any tribunal with limited jurisdiction to ensure it does not overstep its legal authority, but the ICTR in *Ngirabatware* does not wrongly exercise jurisdiction merely by admitting evidence concerning events before 1994. Theoretically, the evidence concerning the accused's alleged attendance at meetings where genocide was planned may create the danger of conviction *per se* for crimes such as conspiracy to commit genocide or complicity in genocide. However, this concern is not valid because although evidence of criminal activity in 1993 may support conviction for crimes in 1994, under no circumstances can the ICTR actually convict the accused for any crimes committed in 1993. The Trial Chamber's denial of the defense motion in *Ngirabatware* was therefore proper, because the tribunal has the authority to consider any relevant evidence with probative value, irrespective

of whether the evidence may also relate to crimes outside the ICTR's temporal jurisdiction.

ICTR REQUESTS *AMICI* SUBMISSIONS IN REFERRAL CASES

On November 4, 2010, the Office of the Prosecutor (OTP) at the International Criminal Tribunal for Rwanda (ICTR) requested to transfer the *Uwinkindi*, *Sikubwabo* and *Kayishema* cases to Rwandan national courts pursuant to Rule 11 *bis* of the Rules of Procedure and Evidence. On January 17, 2011, the ICTR decided to defer its decision on the *Sikubwabo* and *Kayishema* referrals until it reaches a final decision in *Uwinkindi*, or until *Sikubwabo* or *Kayishema*, who remain at large, are arrested. In seeking to resolve the referral issue, the ICTR granted permission to Human Rights Watch to appear as *amicus curiae* in *Uwinkindi*, and the International Criminal Defense Attorneys Association and Rwanda in *Sikubwabo* and *Kayishema*. Although the extent to which *amicus* submissions influence the ICTR's decisions has been unclear in the past, the submissions concerning the possible referral of these three cases to Rwanda will likely influence the tribunal because of its need to make informed decisions despite a limited capacity to independently evaluate Rwanda's judicial and penitentiary systems.

Traditionally, courts have regarded *amicus curiae* as impartial advisers, but, in accordance with the prevailing modern view, the ICTR acknowledged in *Bagasora* that *amicus* briefs need not be impartial. The lack of impartiality has been criticized because it may force parties to address issues not otherwise raised, possibly impairing fair trials without advancing the interests of the court. The extent to which *amicus* filings directly influence the ICTR is unclear, as the tribunal rarely references the submissions in its decisions and judgments, perhaps because doing so may indicate a lack of judge impartiality. Nevertheless, in their article "The Role of *Amicus Curiae* before International Criminal Tribunals," Sarah Williams and Hannah Woolaver suggest that *amici* influence prosecutorial discretion, which can ultimately affect the outcome of a case. For example, in *Akayesu*, the Coalition for Women's Human Rights in Conflict submitted an *amicus* brief calling on the Chamber to order the OTP to include

sexual violence charges in the indictment. Although the Trial Chamber did not issue a decision on the admissibility of the brief, the OTP subsequently sought to amend the indictment to include sexual violence charges, for which Akayesu was convicted.

In the three cases proposed for referral, the *amici* submissions will not simply influence prosecutorial discretion, but they will likely influence the ICTR judges' decisions. The ICTR requested the *amici* to address specific issues, such as the effectiveness of Rwanda's witness protection system and the adequacy of detention facilities under international standards. Informed decisions regarding the transfer of cases to Rwanda require the tribunal to be familiar with Rwandan laws and the extent to which they are impartially enforced. Because limited resources already impair the ICTR's progress on fulfilling core functions, it would be unreasonable for the tribunal to undertake its own complete evaluation of the status of Rwanda's judicial and penitentiary systems. Referring cases could accelerate the tribunal's fulfillment of its completion strategy, but it should not be done at the expense of ensuring respect for the rights of the accused, victims, and witnesses. Therefore, *amici* participation in *Uwinkindi*, *Sikubwabo* and *Kayishema* is necessary and valuable to ensure that the ICTR appropriately determines whether to refer the cases to Rwanda.

ICTR ADMITS RWANDAN GOVERNMENT COMMENTARY ON UN MAPPING REPORT

On March 31, 2011 in the *Nzabonimana* case, Trial Chamber III of the International Criminal Tribunal for Rwanda (ICTR) granted the Defense Motion for the Admission of Documentary Evidence: "Official Government of Rwanda Comments on the UN Mapping Report on the DRC" (Mapping Report). In light of the purposes and methodology of the Mapping Report and the ICTR's limited jurisdiction, the information included in the report and related commentaries may help contextualize the crimes alleged in the ICTR but will not significantly affect the tribunal's proceedings.

In September 2010, the Office of the High Commissioner for Human Rights (OHCHR) released the Mapping Report to document basic information about the most serious human rights abuses and

violations of international humanitarian law that occurred in eastern Democratic Republic of the Congo (DRC) between 1993 and 2003. The Mapping Report assesses the Congolese judicial system's ability to respond to the crimes, and identifies potential transitional justice mechanisms. The Report was not intended to accuse individuals of criminal liability, but to serve as a starting point for the DRC to understand and recover from a history of human rights abuses. To be included in the Mapping Report, a human rights violation must have been reasonably suspected to have occurred based on evidence from two independent sources – proof beyond a reasonable doubt was not necessary. Based on the information gathered using these criteria, the report alleged that Rwanda was involved in perpetrating mass killings in the DRC, among other human rights abuses. The Rwandan government expressed its complete disapproval of the report in an official Commentary, stating that the methodology was flawed and that the historical

context had not been taken into account. The Defense in *Nzabonimana* sought to introduce portions of the Commentary that described the activities of militias in Rwanda as evidence.

Pursuant to Rule 89(c) of the Rules of Procedure and Evidence, a chamber can admit any evidence that has probative value, meaning it tends to prove or disprove an issue. Additionally, the evidence must be *prima facie* credible. The Prosecution alleged that the Commentary lacked probative value because it was highly susceptible to political bias. The Defense claimed that paragraph 8 of the Commentary undermines the Prosecution's contention that various militias operated in Gitarama, Rwanda in 1994, as alleged in the indictment. The Prosecution asserted that the Commentary was not reliable because it lacked a signature, but the Chamber found the Commentary *prima facie* reliable because it is an official government document on file with the OHCHR. The Chamber further acknowl-

edged that admissibility of the evidence bears little relevance to the accuracy of its contents or the weight that it will ultimately be accorded.

While the human rights abuses detailed in the Mapping Report and Rwanda's responses in the Commentary may provide context for crimes being prosecuted at the ICTR, these documents will likely not be significantly relevant to ICTR proceedings particularly because the spatial and temporal jurisdiction of the ICTR precludes any prosecution for crimes committed outside of Rwanda during 1994. Nevertheless, these documents and the controversy surrounding them underscore the far-reaching effects of war and the related challenges of achieving justice in societies that are undergoing and recovering from violent conflict.

Lindsay Roberts, a J.D. candidate at the Washington College of Law, covers the International Criminal Tribunal for Rwanda for the Human Rights Brief.

JUDGMENT SUMMARIES: INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

EMMANUEL RUKUNDO V. THE PROSECUTOR, ICTR 2001-70-A

On October 20, 2010, the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) issued its judgment in the case against Emmanuel Rukundo, an ordained priest and military chaplain for the Rwandan army during the 1994 genocide. Rukundo was convicted of committing genocide for killing Madame Rudahunga and causing serious bodily harm to four Tutsis at Saint Joseph's College, abducting and killing Tutsis from the Saint Léon Minor Seminary and for sexually assaulting a Tutsi woman. The Trial Chamber also convicted Rukundo of murder as a crime against humanity for Madame Rudahunga's killing and for extermination as a crime against humanity for the abduction and killing of Tutsis from the seminary. The Trial Chamber sentenced Rukundo to twenty-five years in prison. The Appeals Chamber dismissed seven of Rukundo's nine grounds for appeal and the Prosecution's sentencing appeal, ultimately reducing Rukundo's sentence from twenty-five to twenty-three years, including time already served.

Rukundo's first successful ground for appeal was based on the Trial Chamber's reliance on the expansive definition of "committing" in the *Gacumbitsi*, *Seromba*, and *Ndindabahizi* cases. The Trial Chamber held that Rukundo's actions were an integral part of the crimes, even though he did not physically carry out any killing or any infliction of serious bodily harm to any of the victims. Rukundo argued that the Trial Chamber erred by convicting him of "committing" genocide and crimes against humanity under Article 6(1) because he was not on notice that he was being charged with "committing" these crimes. The Prosecution argued that the issue was whether Rukundo had sufficient notice to prepare an effective defense, and maintained that Rukundo was aware he was being charged with "committing" the relevant crimes. The Appeals Chamber found that the indictment had only specifically charged Rukundo with ordering, instigating, and aiding and abetting the alleged crimes, and that therefore the Trial Chamber had erred by convicting Rukundo of "committing" genocide and crimes against humanity. As a result, the Appeals Chamber found him responsible for aiding abetting, and not "committing, genocide and murder and extermination as crimes against humanity.

Rukundo's other successful ground of appeal was his contention that the Trial Chamber erred in convicting him of committing genocide by causing serious mental harm to Witness CCH at the Saint Léon Minor Seminary through sexual assault. Rukundo argued, *inter alia*, that the Trial Chamber erred in finding he intentionally inflicted serious harm with genocidal intent, because there was no evidence that he targeted Witness CCH based on her ethnicity. At trial, the evidence established that Witness CCH had approached Rukundo at the seminary and asked that he hide her. Rukundo responded that he could not help her and informed her that her "entire family had to be killed" because her relative, who was a former friend of Rukundo, was assisting the "Inyenzi," the derogatory name used to reference the Tutsis. He then locked her in a room and sexually assaulted her. The Trial Chamber found that Rukundo's statement that Witness CCH's "entire family had to be killed" was proof of genocidal intent when considered in the general context of the mass violence being perpetrated against Tutsis. The Appeals Chamber, however, found that while evidence that an accused used expressions such as "Inyenzi" can, under certain circumstances, establish genocidal intent, "inferences drawn from circumstan-

tial evidence must be the only reasonable inference available.”

The Appeals Chamber held that genocidal intent was not the only reasonable inference to be drawn from the circumstances, as Rukundo’s use of the word “Inyenzi” could have been an expression of anger that his former friend was affiliated with Tutsis and not necessarily an expression of a personal desire to destroy all Tutsis. This inference was supported by the fact that Witness CCH had testified that Rukundo’s comment about her family being killed did not frighten her and that Rukundo later told Witness CCH that he would have hidden her if he had been able to. The majority of the Appeals Chamber also disagreed with the Trial Chamber’s reliance on the “general context of mass violence” in relation to this incident. Specifically, the majority pointed to the fact that, in relation to the other incidents of genocide for which Rukundo was convicted, there was evidence of systematic, repeated searches for Tutsis on the basis of identity cards or lists, and the subsequent killing or assault of the individuals identified through such searches. By contrast, the sexual assault of Witness CCH “appears to have been unplanned and spontaneous.” Accordingly, the Appeals Chamber reversed Rukundo’s conviction for genocide by causing serious mental harm through sexual harassment.

The seven unsuccessful grounds of Rukundo’s appeal included allegations that the Trial Chamber committed errors of law, errors relating the alleged recantation of a Prosecution witness, errors of law and fact in evaluating the evidence, and errors in sentencing. Regarding Rukundo’s claim that the Trial Chamber erred in law and fact in convicting him of genocide and murder as a crime against humanity for the events at Saint Joseph’s College, the Appeals Chamber rejected Rukundo’s argument that the causal elements of murder and serious bodily injury were not proven, noting that the Appeals Chamber had replaced Rukundo’s convictions for committing these crimes with convictions for aiding and abetting. The Appeals Chamber stressed that for purposes of aiding and abetting, unlike committing, there is “no requirement of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime.” Rather, it is sufficient that the

aider and abettor’s actions had a “substantial effect” on the realization of the crime, that the aider and abettor had knowledge that his actions were assisting the principal perpetrator of the crime, and, in the case of specific intent crimes, that the aider and abettor knew that the principal perpetrator possessed the requisite intent.

Rukundo also argued that the Trial Chamber erred by excluding only portions of a witness’s testimony rather than her entire testimony. The Trial Chamber had excluded a portion of the testimony given by Witness BLJ, one of the victims abducted at the college, regarding subsequent events that occurred at Kabgayi hospital, holding that the subject matter of the testimony was not supported in the indictment. The Trial Chamber had relied on other portions of Witness BLJ’s testimony to support finding that Rukundo was linked to the earlier attack at the college. The Appeals Chamber held that it was within the Trial Chamber’s discretion to find a particular piece of evidence inadmissible with regard to a fact of which the accused was not placed on notice, but admissible in relation to other allegations that had been sufficiently pleaded.

Rukundo also appealed his convictions for genocide and extermination as a crime against humanity at Saint Léon Minor Seminary, arguing that the convictions were in error because the indictment did not specify the identity of the abducted victims or the dates of the abductions. The Appeals Chamber found that, given the large number of victims, their identification as “Tutsi refugees taken from Saint Léon Minor Seminary” was sufficiently precise, and the date range of April to May 1994 was not unreasonably broad given that Rukundo had visited the seminary on four separate occasions during that period. Rukundo further contended that the Trial Chamber erred in its assessment of the evidence in convicting him for his participation in the events at the seminary. The Appeals Chamber, granting deference to the discretion of the Trial Chamber, found that there was no error in the evaluation of the evidence that would occasion a miscarriage of justice.

Finally, finding that neither Rukundo nor the Prosecution had demonstrated that the Trial Chamber committed discernable error in assessing Rukundo’s sentence, the Appeals Chamber dismissed both

Rukundo’s appeal against the sentence and the Prosecution’s request to increase Rukundo’s twenty-five year sentence to a life sentence. Recalling that it had dismissed the conviction for genocide by causing serious mental harm to Witness CCH, however, the Appeals Chamber reduced Rukundo’s sentence to twenty-three years.

Catlin Meade, a J.D. candidate at the American University Washington College of Law, wrote this judgment summary for the Human Rights Brief.

THE PROSECUTOR V. ILDEPHONSE HATEGEKIMANA, ICTR-00-55B-T

On December 6, 2010, Trial Chamber II of the International Criminal Tribunal for Rwanda (ICTR) issued its judgment in the case of *Prosecutor v. Hategekimana*. The Chamber found Ildephonse Hategekimana guilty of genocide, murder as a crime against humanity, and rape as a crime against humanity. The Chamber based Hategekimana’s individual criminal responsibility on direct participation and actions as a superior, or Article 6(1) and Article 6(3) of the ICTR Statute respectively. The Chamber sentenced him to life imprisonment.

During 1994 genocide, Hategekimana was Commander of the Ngoma Military Camp, a lieutenant in the Rwanda Defense Forces, the former national army, and a member of the Butare Préfectoral Council, which was responsible for peace and security in the Ngoma Commune. The Prosecution alleged that between April 7 and May 13, 1994, Hategekimana participated as a military official in a number of incidents that supported its charges of genocide and crimes against humanity, including the killing and raping of members of the Tutsi population and Tutsi sympathizers; the erection of roadblocks for the purpose of identifying, arresting, killing, or seriously harming individuals carrying Tutsi identification cards; the distribution of weapons; the issuance of *laissez-passer* (special emergency travel permits) to soldiers and others involved in the alleged criminal acts; and, the endorsement of a genocidal message through his attendance at an inflammatory speech.

Of the fourteen alleged incidents, the Chamber dismissed all but five. With respect to the dismissed allegations, the

Chamber found that the Prosecution had failed to present sufficient evidence to establish beyond a reasonable doubt that Hategekimana bore criminal responsibility for the alleged acts.

Regarding the remaining five incidents, Defense counsel argued that Hategekimana could not be held responsible for any of the alleged acts, each of which involved the participation of soldiers from the Ngoma Camp, for two reasons. First, counsel argued that Hategekimana was not at Ngoma Camp at the time the alleged crimes were committed. Several witnesses testified as to Hategekimana's hospitalization and recovery in April 1994 from war injuries. Second, counsel argued that both Hategekimana and the Ngoma Camp soldiers he allegedly led were injured, disabled, and sick, thereby rendering their participation in any of the alleged crimes impossible. The Chamber found Hategekimana's alibi lacking in credibility and held that he was present during five of the alleged incidents. The Chamber also found that the men at the Ngoma Camp included both injured and able-bodied soldiers and that the injured men were not precluded from committing any of the alleged acts.

As to Hategekimana's convictions, the Chamber found the accused guilty of both genocide and murder as a crime against humanity because of his participation in a joint criminal enterprise with Ngoma Camp soldiers, *Interahamwe* (a Hutu paramilitary group), and armed civilians on three occasions. First, Hategekimana led armed soldiers from the Ngoma Camp to assist *Interahamwe* and armed civilians in identifying and murdering three Tutsi women on the night of April 23, 1994. Second, he led Ngoma Camp soldiers in a coordinated attack aimed at massacring 500 Tutsis at the Ngoma Parish on April 30, 1994. Third, Hategekimana ordered his soldiers to assist in an attack that led to the abduction and murder of more than twenty-five Tutsis at the Benezikira Convent on April 30, 1994.

The Chamber determined that the accused's participation in the joint criminal enterprise consisted of lending human resources and ordering the killing of civilians, and it noted that "as the Ngoma Camp Commander and a respected local figure, Hategekimana's presence and utterances on the various crime scenes had a substantial effect on the killings which fol-

lowed." Regarding the charges of genocide, the Chamber found in each instance that Hategekimana acted with genocidal intent. With respect to the charges of murder as a crime against humanity, the Chamber found that he had knowledge that the killings formed part of a broader widespread or systematic attack against a civilian population on national, political, ethnic, racial or religious grounds. In addition, the Chamber found that Hategekimana acted with the requisite *mens rea* to bear responsibility for murder as a crime against humanity based on the fact that he ordered Ngoma Camp soldiers to murder Jean Bosco Rugomboka on April 8-9, 1994. While the Chamber was also satisfied that the accused bore responsibility for the murder of Rugomboka under a theory of superior responsibility, it indicated that it would not sentence Hategekimana for the crime under both a direct and superior theory of responsibility, in accordance with prior ICTR jurisprudence. Finally, Hategekimana was found guilty as a superior for the rape of Nura Sezirahiga as a crime against humanity, based on a finding that the accused had effective control over the perpetrator of the rape, who was a Ngoma Camp soldier, and that Hategekimana failed to take the necessary and reasonable measures to prevent the rape or punish the perpetrator thereafter.

The Chamber took into account a number of mitigating and aggravating circumstances in the decision to sentence Hategekimana to life imprisonment. The Chamber noted the well-established principle in the jurisprudence of both the ICTR and the International Criminal Tribunal for the former Yugoslavia that an individual's personal position in the community should be considered in the determination of an appropriate sentence. Aggravating circumstances included Hategekimana's local status, role as a superior, level of education, and number of victims that resulted from the killings. The Chamber found few mitigating factors, although it did give weight to the fact that Hategekimana had a difficult childhood as an orphan and that he had an arduous experience in battle as a soldier for the Rwandan Army. Regardless of the mitigating factors, the Chamber found the gravity of the crimes and the aggravating circumstances appropriate grounds to sentence Hategekimana to a single sentence of life imprisonment.

Elizabeth Francis, a J.D. candidate at the American University Washington College of Law, wrote this judgment summary for the Human Rights Brief.

THE PROSECUTOR V. GASPARD KANYARUKIGA, ICTR-2002-78-T

On November 1, 2010, Trial Chamber II of the International Criminal Tribunal for Rwanda (ICTR) delivered its judgment in the case against Rwandan businessman Gaspard Kanyarukiga. The Prosecution brought three charges against Kanyarukiga for his involvement in the attacks on Tutsi civilians in the Kivumu *commune* at the Nyange Parish on April 15-16, 1994: 1) genocide, 2) complicity in genocide, and 3) extermination as a crime against humanity. The Chamber convicted Kanyarukiga of genocide and extermination and sentenced him to thirty years in prison.

The Prosecution alleged, and the Chambers found, that following the death of Rwandan President Juvénal Habyarimana on April 6, 1994, Tutsi civilians were attacked in their homes in the Kivumu *commune*, and they subsequently sought refuge in public buildings, including the Nyange Parish Church. The Prosecution also alleged that Kanyarukiga attended meetings between April 10 and 16, 1994, at which attacks against the Tutsi civilians taking refuge in the Nyange Church were planned, and that Kanyarukiga ordered and instigated attacks on the civilians, including the bulldozing of the church, which resulted in the death of 2,000 Tutsi civilians. Specifically, the Chamber found that the Prosecution showed beyond a reasonable doubt that attacks against Tutsi civilians in the Kivumu *commune* occurred after April 6, 1994.

The Prosecution also showed that armed attackers surrounded the Nyange Church on April 12, 1994, and that Kanyarukiga was present at meetings at the Nyange Parish on April 14, 1994. Kanyarukiga was present after, but not during, attacks perpetrated by Hutu assailants against the Tutsi civilians in the Nyange Church and an attempted burning of the church on April 15, 1994. There was also sufficient evidence that Kanyarukiga attended a meeting on April 16, 1994, at which the destruction of the Nyange Church was discussed, and that he stated the church had to be destroyed and he would rebuild it. The Chamber found that on April 16, 1994,

the Nyange Church was destroyed using at least one bulldozer, killing approximately 2,000 Tutsi civilians, although there was not sufficient evidence to establish that Kanyarukiga was present during the destruction of the church. Ultimately, the Chamber found that the destruction of the Nyange Church and related attacks constituted genocide.

The Chamber did not accept Kanyarukiga's alibi, by which the defense claimed that between April 12 and 16, 1994, the accused was busy securing travel documents in an effort to ensure the safety of his family, and therefore not present at the Nyange Parish during the meetings and attacks against Tutsi civilians. The Defense filed the notice of alibi after the presentation of the Prosecution's case, and did not finalize its list of witnesses until three months later. Many of the witnesses who testified in support of the alibi had an interest in the positive outcome of the case because they were related to, had business relations with, or depended financially on Kanyarukiga. Generally, the evidence presented by the witnesses lacked inconsistencies, which the Chamber typically expects when several different people testify, and the evidence was "too neatly tailored" to match the Prosecution's specific allegations. Finally, the Chamber had misgivings about the route Kanyarukiga purportedly took to secure travel documents and locate his family. The time Kanyarukiga claimed it took him to travel was nearly double the time that the Chamber found it would be while on a site visit in 2010, and it was unlikely that Kanyarukiga would have taken the "precarious, long and difficult" route with his family, particularly given the insecurity in Rwanda in April 1994. Because of these factors, the Chambers found that the alibi could not reasonably be true.

Regarding Kanyarukiga's responsibility for genocide, the Prosecution alleged that the accused bore responsibility, either individually or as a member of a joint criminal enterprise, pursuant to Article 6(1) of the ICTR Statute, which states that "a person who planned, instigated, ordered,

committed or otherwise aided and abetted in the execution of [a crime within the jurisdiction of the Tribunal] shall be individually responsible for the crime." The Chamber determined that the planning mode of liability most accurately captured Kanyarukiga's alleged conduct. To be convicted of planning, the accused, either alone or with others, must design criminal conduct that is later perpetrated, the planning must substantially contribute to the commission of genocidal acts, and the accused must have the intent to plan the commission of a crime or know that there is a substantial likelihood that crime would be committed.

Kanyarukiga's participation in meetings at which attacks against the Tutsi civilians were planned, and particularly his statement that the Nyange Church had to be destroyed and that he would rebuild it, demonstrated that he helped plan the criminal conduct that was later carried out when the church was bulldozed. The Chamber found that the plan to destroy the church substantially contributed to the commission of genocide because the bulldozing of the church resulted in the death of 2,000 Tutsi civilians. Genocidal intent can be inferred from the facts, so long as it is the only reasonable inference available. The Chamber found that because Kanyarukiga knew that Tutsi civilians taking refuge inside the church would be killed if the church were destroyed, he acted with the intent to destroy the Tutsi ethnic group in whole or in part. The Chamber therefore found Kanyarukiga guilty of genocide. Although the Prosecution also charged the accused with complicity in genocide, the Chamber did not consider this count because an accused cannot be convicted of both genocide and complicity in genocide.

Turning to the charge of extermination as a crime against humanity, the Chamber reiterated that, under Article 3 of the ICTR Statute, crimes against humanity must be committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. Extermination is the

act of killing on a large scale, although there is no numerical minimum that constitutes a "large scale." The Chamber found that the destruction of the Nyange Church was part of a widespread or systematic attack against Tutsi civilians, that Kanyarukiga knew his actions in planning the destruction of the church formed part of this broader attack, that the killing of 2,000 Tutsis could "only be described as large scale," and that the accused intentionally contributed to the killing of Tutsi civilians on a large scale. Therefore, Kanyarukiga was also guilty of extermination as a crime against humanity.

To determine Kanyarukiga's sentence, the Chamber considered the gravity of the offense, aggravating circumstances, mitigating circumstances, and past sentencing practices of the Tribunal. The Chamber did not find that Kanyarukiga deserved the most severe sentence because, although his conduct was grave, the Prosecution did not establish that the accused directly participated in, or was present during, the destruction of the Nyange Church and the resulting deaths of Tutsi civilians. However, the Chamber considered the particular vulnerability of the victims, who took refuge in a place of worship and were prevented from escaping, an aggravating circumstance. The Chamber treated Kanyarukiga's age, which appeared to be between 63 and 72 years, as a mitigating circumstance. The Chamber took into account comparable sentencing practices in similar cases. Individuals convicted of genocide and extermination as a crime against humanity have been sentenced for twenty-five years to life imprisonment, except where the accused pled guilty or there were substantial mitigating factors. Taking all of these factors into account, the Chamber sentenced Kanyarukiga to thirty years in prison for genocide and extermination as a crime against humanity.

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**INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

**FORMER HOSTAGES OF THE REPUBLIKA
SRPSKA ARMY TESTIFY AGAINST
KARADŽIĆ**

On February 2, 2011, former UN military observer Patrick Rechner testified at the International Criminal Tribunal for the former Yugoslavia (ICTY) about his experience as one of over 200 UN staff members taken hostage by Republika Srpska Army (VRS) forces in May and June of 1995. The prosecution alleges that the VRS used the hostages as human shields at strategic military locations to prevent NATO air strikes on those targets in violation of *jus in bello*. Former Republika Srpska President Radovan Karadžić is charged with ordering the hostage taking and, in the alternative, with failing to act once made aware of it. While Karadžić argues UN staff were captured and treated legitimately as prisoners of war, testimony from numerous prosecution witnesses suggests otherwise.

The taking of hostages in non-international conflicts is a grave breach of the laws and customs of war codified in Common Article 3 of the Geneva Conventions. There are three elements of the crime of hostage-taking. A perpetrator must: (1) seize one or more hostages, (2) control the hostages and (3) intend to use the hostages to force concessions from another party. Karadžić is not the first defendant before the ICTY to be charged with hostage-taking. In 2004, the ICTY convicted Tihomir Blaškić of taking civilian hostages with the intent of forcing his opponent to cease military operations and of killing hostages. The prosecution alleges that Karadžić and former General Ratko Mladić centrally controlled hostage-taking activities of the VRS.

On the morning of May 26, 1995, VRS forces captured Patrick Rechner and two other members of his military observer team in Pale, Bosnia. Rechner testified that at the time of his capture, he called Jovan Zametica, Karadžić's senior political advisor, who advised Rechner to cooperate with his captors. The VRS transported the hostages to an ammunition depot where the VRS handcuffed the hostages to a lightning rod and the depot warehouse's door. The VRS repeatedly warned the hostages that if NATO carried out air strikes, they

would either die in the attacks or be executed in retaliation. During the six hours that Rechner was chained to a lightning rod, he was visited by Zametica. In addition to Zametica's visit, the widespread hostage-taking and transport of hostages supports an inference that a central controlling authority organized the hostage-taking activities.

Karadžić argues that the UN peacekeepers and observers were members of a "warring side," and therefore their capture and detention was legitimate under the laws of war. During his cross-examination of Rechner, Karadžić attempted to establish that VRS forces told Rechner that he was being held as a prisoner of war and given rights and privileges afforded to prisoners of war. VRS forces granted many requests of the hostages, including requests for a visit from the International Committee of the Red Cross, phone calls home, visits from a doctor, and television access. Rechner explained that the television access was for purposes of receiving information from the media. Karadžić concluded his cross-examination by expressing empathy for Rechner's ordeal, but also maintained that his sympathies lay with those affected by NATO airstrikes.

Regardless of whether Karadžić establishes that the UN staff held hostage by the VRS were combatants under international humanitarian law, it is likely that the ICTY will find that the elements of the crime of hostage-taking under Common Article 3 are satisfied. Testimony and evidence adduced by the prosecution support the conclusions that the VRS seized over 200 hostages, that hostages were under VRS control, and that the VRS intended to use the hostages to prevent UN air strikes on VRS military installations. If the prosecution establishes that Karadžić and Mladić centrally controlled hostage-taking activities, it is unlikely that Karadžić will be able to successfully defend this charge.

**DORĐEVIĆ SENTENCED UNDER JOINT
CRIMINAL ENTERPRISE FOR KOSOVO
ATROCITIES**

On February 23, 2011, Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia (ICTY) sentenced former Serbian Assistant Minister of Internal Affairs (MUP) and Public Security Department (RJB) Chief Vlastimir Đorđević to 27 years of imprisonment for

war crimes and crimes against humanity. Đorđević's was the fifth and final case at the ICTY addressing atrocities in Kosovo. The Trial Chamber found Đorđević individually criminally responsible under Article 7(1) of the ICTY Statute for the crimes of forcible transfer of a population, murder, and persecution, as crimes against humanity. The Chamber also found Đorđević guilty of murder as a violation of the laws and customs of war. The Chamber convicted Đorđević under the doctrines of joint criminal enterprise (JCE) and aiding and abetting under Article 7(1). The doctrine of JCE provides a mechanism for establishing complete individual criminal responsibility for acts that require coordinated action by multiple individuals. The Chamber also stated that it alternatively could have found him guilty under Article 7(3) of the statute for failure to prevent and punish these crimes. Trial Chamber II's holding Đorđević responsible for these crimes under a theory of JCE builds on ICTY jurisprudence and illustrates how the ICTY applies JCE.

JCE is not defined in the ICTY's statute. While the ICTY cites post-World War II cases as the source of the doctrine of JCE, it largely developed in the ICTY's jurisprudence. Under Article 7(1) of the ICTY Statute (Individual Criminal Responsibility), "[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime." The ICTY ruled in the *Tadić* case that Article 7(1) is supported by customary international law and allows Chambers to determine an accused's guilt "as a principal or an accessory or otherwise as a participant." Specifying where JCE falls under Article 7(1), the Appeals Chamber held in the *Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction* that JCE is a form of criminal liability for "commission" of a crime. This substantially expanded the meaning of "commission" under Article 7(1) from the standard written into the ICTY Statute.

Applying a theory of JCE as a form of "commission" requires satisfying distinct elements. Establishing *actus rea* under a theory of JCE involves three elements: the existence of a group working towards achieving a common purpose, the common purpose of this group being the commis-

sion of a crime under the ICTY's statute, and participation by the accused in furthering this group's goal of achieving this common purpose. Under the variant of JCE applied in this case (JCE 1), the prosecution establishes the adequate *mens rea* for commission of a given crime under JCE when it demonstrates that the accused intended to aid in perpetrating that crime along with his co-perpetrators.

In *Đorđević*, the prosecution presented evidence that, between March and June of 1999, Đorđević collaborated with other top Serbian leaders in Kosovo to violently drive out the ethnic Albanian population. The prosecution asserted that Đorđević had effective control over police forces in Kosovo responsible for committing mass atrocities including systematic shelling of towns and villages, burning of villages and farms, sexual assaults, and the ensuing deportation of approximately 800,000 Kosovar Albanians. The defense argued that these crimes were not attributable to a joint criminal enterprise and that, even if a joint criminal enterprise existed, Đorđević could not have significantly contributed to a common plan because he lacked effective

control over MUP forces in Kosovo. The defense asserted that the crimes committed were "isolated incidents perpetrated by random individuals" and that coordinated actions by Yugoslav army and MUP only targeted "terrorist forces."

Rejecting the defense's arguments, the Trial Chamber held that, "The nature of the crimes that have been established and the circumstances in which they were committed clearly demonstrates that the target of this campaign was the Kosovo Albanian population." The Trial Chamber held that Đorđević was a key participant in the joint criminal enterprise because he exercised effective control over the police in Kosovo and helped to conceal the murders of Kosovo Albanians. Noting Đorđević's complete failure to investigate crimes committed by MUP forces and his aiding in concealing the bodies of murdered Kosovo Albanians, the Trial Chamber also found Đorđević responsible for aiding and abetting the same crimes he was convicted of under the theory of JCE. Furthermore, the Trial Chamber stated that it would have found Đorđević guilty under a theory of command responsibility, ICTY Article

7(3), if its finding of guilt under Article 7(1) had not precluded the Trial Chamber from doing so.

The prosecution logically followed expansive ICTY jurisprudence in establishing Đorđević's guilt under a theory of JCE. The tribunal established JCE to allow prosecution under Article 7(1) (individual criminal responsibility) in complex cases where the prosecution would encounter difficulty proving a more restrictive definition of "commission." Given evidence of the involvement of other Serbian leaders and Đorđević's involvement in the actions of Serbian police and paramilitary forces, a conviction under JCE was the prosecution's best possible strategy. A conviction under aiding and abetting or for failure to prevent and protect would have been unlikely to result in such a substantial sentence. Thus, Đorđević's case illustrates the significance of the development of JCE at the ICTY.

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