

2005

Updates from the International Criminal Courts

Mariam Ahmedani

American University Washington College of Law

Christina Barba

American University Washington College of Law

Brianne McGonigle

American University Washington College of Law

Anne Heindel

American University Washington College of Law

Leslie Thompson

American University Washington College of Law

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/hrbrief>



Part of the [Criminal Law Commons](#), [Human Rights Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Ahmedani, Mariam, Christina Barba, Brianne McGonigle, Anne Heindel, and Leslie Thompson. "Updates from the International Criminal Courts." *Human Rights Brief* 13, no. 1 (2005): 37-43.

This Column is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *Human Rights Brief* by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

UPDATES FROM THE INTERNATIONAL CRIMINAL COURTS

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

PROGRESS OF THE COMPLETION STRATEGY

On September 29, 2005, Radovan Stankovic became the first indictee of the International Criminal Tribunal for the Former Yugoslavia (ICTY) to be transferred to a state in the former Yugoslavia for trial. He will be tried by the War Crimes Chamber of the Court of Bosnia and Herzegovina (BiH). Stankovic is charged with four counts of crimes against humanity and four counts of violations of the laws or customs of war. The indictment alleges that from around August 1992 until October 1992 Stankovic and other Serb soldiers were in control of a house in which at least nine Muslim women and girls were detained, sexually assaulted, and repeatedly raped. Stankovic allegedly assigned the women and girls to specific Serb soldiers who raped and sexually assaulted them. The indictment further alleges that Stankovic personally raped at least two women.

Stankovic's case has been referred to the BiH national court under a 2004 amendment to Rule 11 bis of the Rules of Procedure and Evidence (RPE). The Tribunal adopted the changes to Rule 11 bis RPE, among other amendments, to comply with the completion strategy laid out by Security Council Resolutions 1503 and 1534. Under a mandate from the Security Council, the strategy requires a phased and coordinated completion of the Tribunal's mission by the end of 2010.

The Presidency and the Office of the Prosecutor (OTP) have both worked to reduce the caseload of the Tribunal and to expedite the progress of trials to meet the 2010 deadline. The OTP has stated that the Tribunal will be forced to focus on prosecuting the most culpable conduct. Some cases involving lesser accusations and officers of lower rank will therefore be referred to national courts. Under the amended Rule 11 bis RPE, cases can be referred to state authorities in those territories where the crime was committed, where the accused was arrested, or where the state has jurisdiction and the state authority is willing and adequately prepared to accept the case. The

rule has been expanded to refer cases that have only been investigated, in addition to those that have resulted in indictments.

In cases where there has been an indictment, the Referral Bench, a panel of three judges selected from the Trial Chambers, must grant the motion for referral. The Bench considers the gravity of the crime and the level of responsibility of the accused to determine if the case is appropriate for a Rule 11 bis RPE referral. It must also be satisfied that the trial will be conducted fairly and that the death penalty will not be imposed.

Referral to national courts of pre-indictment cases has resulted in three convictions in Rijeka County Court, and 17 ongoing trials before the War Crimes Chamber of the Belgrade County Court. The Serbian War Crimes Prosecutor has also issued indictments against seven people. Twelve post-indictment Rule 11 bis RPE motions have been filed involving 14 people in BiH and six people in Croatia.

Rule 98 bis RPE was also amended in 2004 to bring greater efficiency to the Tribunal's proceedings. The amendment requires the Trial Chamber to orally enter a judgment of acquittal on any count if, at the close of the Prosecutor's case, "there is no evidence capable of supporting a conviction." This rule is similar to a directed verdict. It allows the entire case or parts of the case to be dismissed if, at the close of the OTP's case, the defense believes the OTP has not met its burden of proof. This procedure was first used in June 2005 in *Prosecutor v. Oric*, after which the presiding Judge noted that the amended Rule 98 bis RPE significantly reduced the length of the trial.

Although these new procedures have increased the efficiency of the Tribunal, the biggest obstacle to meeting the mandated 2010 completion strategy, according to Prosecutor Del Ponte, is those fugitives who remain at large. The ICTY's three most wanted individuals — the former Bosnian Serb leader Radovan Karadzic, his military commander Ratko Mladic, and retired Croat General Ante Gotovina — continue to remain out of the Tribunal's reach and delay the completion of its work.

Prosecutor Del Ponte recently traveled to Belgrade to assess Serbia's cooperation with the ICTY. Serbia has surrendered 16 indictees, delivered documents, and provided increased access to witnesses over the past 12 months. The Prosecutor expressed regret, however, that several fugitives remain at large. It is suspected that Mladic, the commanding general of the Bosnian Serb forces that carried out the Srebrenica genocide, is being protected by elements of the Serb military.

During the Srebrenica genocide, 8,000 men and boys were summarily executed between July 11th and 17th, 1995. This was confirmed as genocide by the ICTY in an appeal decision in April 2004. The Prosecutor has called for the handover of Mladic by December 2005, to coincide with the 10th anniversary of the Dayton Agreement, which ended the Bosnian war and established the current constitutional regime. Unfortunately, this is not the first deadline issued for the extradition of Mladic. The first was July 11, 2005, to mark the anniversary of the Srebrenica massacre. Despite these accusations, many Serbs, both in BiH and in Serbia still consider Mladic a hero. A recent poll indicated that over one-third of the Serbian population does not believe that crimes were committed in Srebrenica.

Prosecutor Del Ponte also traveled to Croatia to assess its cooperation with the ICTY. She stated that Croatia has been cooperating fully to locate and arrest Ante Gotovina. Gotovina was indicted in 2001 for crimes committed against Serbs in the course of a military operation to retake Croatian territory that the Serbs had occupied. Over 100 Serbs were killed during the operation, and 100,000 of them were forced to leave their homes because they were looted and destroyed. The operation was a success from the Croatian perspective, and many Croatians revere Gotovina as a national hero. Only recently has the Croatian government acknowledged that crimes were committed during this operation, and it is rumored that Gotovina is hiding in a Franciscan monastery in Croatia or Bosnian Croat territory. Del Ponte expressed confidence that Croatia's diligence in investigat-

ing Gotovina's whereabouts would lead to his eventual transfer to The Hague.

Del Ponte contends that it may be necessary to revise the completion strategy target dates if all of the indictees are not arrested and transferred to the ICTY in the near future. It remains unclear if the Security Council would be willing to extend the mandated 2010 deadline for completion. ICTY President Theodor Meron informed the Security Council in June of this year that the Court needs to extend its deadline for completing trials of first instance from 2008 to 2009. There has been no mention, however, by Meron or other ICTY officials of delaying the completion of the Tribunal's work beyond 2010.

RECENT ARRESTS

Russian Federation authorities arrested Dragan Zelenovic, who had been at large for more than nine years, on September 2, 2005. Zelenovic was sub-commander of the military police and a paramilitary leader in Foca, which is located on the Drina River, east of Višegrad in south-eastern Bosnia and Herzegovina. The ICTY has requested that Russian authorities transfer Zelenovic to The Hague. He is charged with seven counts of crimes against humanity and seven counts of violations of the laws or customs of war. Specifically, the indictment charges him for multiple counts of individual rape, for organizing and participating in gang rape, and for transporting women for sexual assaults and torture.

Milan Lukic was arrested on August 8, 2005, in Argentina. The indictment against Lukic alleges that in Višegrad in the spring of 1992 he formed a group of paramilitaries that worked with local police and military units to exact a reign of terror on the local Muslim population. This group of paramilitaries was often referred to as the "White Eagles" or the "Avengers." Lukic is charged with the crimes against humanity of extermination, persecution, murder, and other inhumane acts committed in Višegrad between May 1992 and October 1994. The accusations include five separate incidents of murder, including forcing Bosnian Muslim women, children, and elderly men into a house that was subsequently barricaded and set on fire. Those who tried to save themselves by climbing out the windows were shot at, and almost everyone locked in the house was killed, including 17 children between the ages of two days and 14 years. The ICTY Prosecutor has characterized the

charges against Milan Lukic as crimes against humanity and violations of the laws or customs of war.

In addition to Milan Lukic, the Tribunal has indicted Sredoje Lukic and Mitar Vasiljevic for their immediate responsibility for the crimes committed in Višegrad. The initial indictment was confirmed on August, 28, 1998; however, Vasiljevic is the only one who has been convicted by the Tribunal. He is currently serving a 15-year sentence after being convicted by the ICTY for the killing of five men. Sredoje Lukic was transferred to the ICTY from Republica Srpska on September 16, 2005.

CONTEMPT INDICTMENTS

The Court unsealed indictments against Josip Jovic and Marijan Krizic on September 9, 2005. They are each charged with contempt in the case of *Prosecutor v. Tihomir Blaskic*, in which final judgment was issued by the Appeals Chamber on July 29, 2004.

Josip Jovic was the editor-in-chief of the Croatian daily newspaper *Slobodna Dalmacija*. The indictment alleges that he "knowingly and willfully interfered with the administration of justice by publishing the identity of a protected ICTY witness, by publishing the fact that the witness testified in closed session of the Tribunal, and by publishing excerpts of that testimony, in whole or in part, and by directly violating the 1 December 2000 court order."

Marijan Krizic, editor-in-chief of the Croatian weekly newspaper *Hrvatsko Slovo*, was indicted for allegedly disclosing "the identity of a protected witness, the extracts of closed-session testimony, and the fact that the protected witness had testified in non-public proceedings before the Tribunal."

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

PROSECUTOR V. EMMANUEL NDINDABAHIZI, CASE NO. ICTR-2001-71-I

On July 15, 2004, Trial Chamber I of the International Criminal Tribunal for Rwanda (ICTR) delivered its judgment in *Prosecutor v. Ndindabahizi*. The accused, Emmanuel Ndindabahizi, served as Minister of Finance in the interim government that seized power after the April 9, 1994, plane crash that killed the President of Rwanda and launched the Rwandan genocide. The amended indictment charged the accused with geno-

cide, extermination as a crime against humanity, and murder as a crime against humanity. The Chamber found Ndindabahizi guilty on all charges and sentenced him to imprisonment for the remainder of his life.

The *Ndindabahizi* case concerned the accused's actions in relation to the events at Gitwa Hill and the roadblocks along the Kibuye-Gitarama road in Gitesi Commune in April and May 1994. Gitwa Hill was the site of a gathering of thousands of Tutsi refugees who were encircled and sporadically attacked from approximately April 17 – April 26, 2005, by a mostly civilian group armed with machetes, guns, grenades, and other weapons, resulting in the death of thousands of Tutsis. The roadblocks along the Kibuye-Gitarama road were also the site of numerous killings of Tutsis in May 1994.

ATTACKS AT GITWA HILL

The Trial Chamber found Ndindabahizi guilty of instigating and aiding and abetting genocide at Gitwa Hill. On the two occasions he was found to have visited the Hill, the attackers taking part in the siege gathered around him and listened to his words, which held considerable authority due to his position in the government. Consequently, he was found to have substantially contributed to the mass killing of Tutsis by verbally encouraging the killings with statements such as, "Go. There are Tutsi who have become difficult ... There are Tutsi on the hill and they've proved to be difficult. You, therefore have to kill them, and when you kill them, you will be compensated." In addition to urging the attackers to kill, Ndindabahizi distributed weapons to them and, on at least one occasion, transported about 50 armed *Interahamwe* militia to join in the attacks. The Chamber found that Ndindabahizi knew that his actions and words were part of a wider context of targeted killings of Tutsis throughout the Kibuye Prefecture and Rwanda. Moreover, his explicit instructions to kill Tutsis and his actions to that effect demonstrated his intent to destroy the Tutsi ethnic group in whole or in part.

The Chamber determined that the killing of the refugees also met the requirements of a crime against humanity because it was part of the widespread ethnic massacres occurring throughout Rwanda and the Kibuye Prefecture during this period. Ndindabahizi knew that the attack at Gitwa Hill was part of these attacks and clearly demonstrated his intent to kill the refugees.

The Chamber noted that no evidence established that the accused had directly killed any person at Gitwa Hill. Nevertheless, he had distributed weapons, transported attackers, and urged the *Interahamwe* to kill Tutsis because of their ethnic identity. The Chamber reiterated that, as a government minister, the accused's words and actions were perceived as authoritative and had a motivating effect on the attackers. Thus, his actions satisfied the material element of the crime of extermination, which requires contribution to or participation in the killings of large numbers of individuals. Consequently, Ndindabahizi was found guilty of committing extermination by creating and contributing to the conditions for mass killing and, in the alternative, of instigating and aiding and abetting extermination.

ROADBLOCKS IN GITESI COMMUNE

In relation to the roadblocks along Kibuye-Gitarama Road, the Trial Chamber found that, although the accused distributed weapons and encouraged the killing of Tutsis at two different locations, there was limited evidence that he had directly and substantially contributed to the multiple killings that took place. For example, although Ndindabahizi had encouraged *Interahamwe* and others at a roadblock near Nyabahanga Bridge to kill Tutsi women married to Hutu men, the Chamber found that there was insufficient evidence of when or where such killings actually occurred to connect his conduct to the crimes. Nevertheless, the Chamber found Ndindabahizi guilty of instigating and aiding and abetting genocide for the killing of one individual named Nors, who was apprehended and killed immediately after the accused had passed out machetes and money to people manning the Gaseke roadblock and asked them why Tutsis were being allowed passage. The Trial Chamber affirmed that the killing of a single person who is a member of a protected group is sufficient to satisfy the definition of genocide if committed with the requisite specific intent. Because many Tutsi had been targeted and killed at the Gaseke roadblock, and the attackers had to have been aware that Tutsis were being targeted throughout the area, the Chamber found that, in killing Nors, the attackers had committed genocide.

The Trial Chamber noted that Nors was part German and part Rwandan, and that his ethnic identity was characterized in different ways by different witnesses. To determine whether Nors had been targeted on the

basis of his membership in the Tutsi ethnic group, the Chamber followed the *Bagilishema* judgment in finding that "the subjective intentions of the perpetrators are of primary importance." Consequently, "if a victim was perceived by a perpetrator as belonging to a protected group, the victim should be considered by the Chamber as a member of the protected group, for purposes of genocide." The Chamber noted that Nors had been described as having some physical traits of the Tutsi, was perceived to be part-Tutsi, and was killed immediately after the accused had instructed the attackers to kill Tutsis. It thus determined that Nors was targeted and killed because he was understood to be, at least in part, of Tutsi ethnicity. Although one witness testified that Nors had been targeted "because he was white, or Belgian," the Trial Chamber found that the existence of possible additional motivations for his killing did not displace the attackers' genocidal intent. The Trial Chamber cited the *Niyitegeka* case, in which the ICTR Appeals Chamber found that acting with the specific intent to destroy a group "as such ... does not prohibit a conviction for genocide in a case in which the perpetrator was also driven by other motivations that are legally irrelevant in this context."

The Chamber then found that the killing of Nors was committed as part of a widespread and systematic attack against the Tutsi and was therefore also punishable as a crime against humanity. The Chamber noted that the roadblocks were part of planned attacks on the Tutsi civilian population and that Nors' death resulted from those attacks. By explicitly urging the roadblock guards to kill Tutsis and providing them with machetes and money for that purpose, the accused directly and substantially contributed to the intentional killing of Nors. As such, the Trial Chamber found that the accused both instigated and aided and abetted in the crime against humanity of murder.

In sentencing Ndindabahizi to life imprisonment, the Trial Chamber noted that, although he had been found guilty of participating in only a few criminal events, his active support for a policy of genocide as an influential governmental figure outweighed any mitigating factors.

PROSECUTOR V. ANDRÉ NTAGERURA, EMMANUEL BAGAMBIKI, AND SAMUEL IMANISHIMWE, CASE NO. ICTR-99-46-T

On February 25, 2004, Trial Chamber III of the ICTR rendered its judgment in the

case of *Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe*. This case addressed the responsibility of the accused for large-scale attacks against primarily Tutsi refugees, as well as the imprisonment, mistreatment, and killing of specific individuals in Cyangugu from April – June 1994. During this period, the *Interahamwe* militia and other groups killed massive numbers of Tutsi civilians in the prefecture. Moreover, groups such as gendarmes, soldiers, and Kagano Commune officials, over whom the accused had legal authority, participated in several attacks.

Ntagerura, the Minister of Transportation and Communication in the interim government, was charged with genocide, conspiracy to commit genocide, two counts of complicity in genocide, extermination as a crime against humanity, and serious violations of Article 3 common to the Geneva Conventions. Bagambiki, the prefect of Cyangugu, was charged with genocide, complicity in genocide, conspiracy to commit genocide, crimes against humanity (murder, extermination, and imprisonment), and serious violations of Article 3 common to the Geneva Conventions. Imanishimwe, the army commander of the Karambo military camp in Cyangugu, was charged with genocide, complicity in genocide, crimes against humanity (murder, extermination, torture, and imprisonment), and serious violations of Article 3 common to the Geneva Conventions. The charges of conspiracy to commit genocide against Ntagerura and Bagambiki were dismissed after the Chamber determined that the supporting allegations, even if proven, could not constitute the material elements of the crime of conspiracy. Due to a lack of evidence, Ntagerura and Bagambiki were also acquitted of all remaining charges. Since then, their movement has been largely restricted to a safe house in Arusha as they await the prosecutor's appeal of the verdict. Except for Rwanda, which is not acceptable to the defendants, no country has expressed a willingness to host them during this period. Imanishimwe, on the other hand, was found guilty on all counts with the exception of complicity in genocide. He was sentenced to 27 years imprisonment, minus credit for time served.

The Trial Chamber did not make any factual findings with respect to several allegations in the Ntagerura indictment due to the vagueness of the charges and the failure of the prosecutor to allege any criminal conduct on the part of the accused. Additionally, a

significant amount of evidence in the indictment was not proved beyond a reasonable doubt. Although the Chamber accepted that the accused had attended and addressed a meeting at the Bushenge market in February of 1994, it noted that this meeting occurred outside the temporal scope of the Tribunal's jurisdiction. Moreover, it did not find any link between his participation in that meeting and any subsequent illegal act. Because this allegation formed the sole remaining basis for the counts against him, Ntagerura was found not guilty on all charges.

Bagambiki was prefect at the time of the incidents and had legal authority to requisition both gendarmes and soldiers. Nevertheless, the Chamber did not find that he had a superior-subordinate relationship with either group due to the lack of proof that he had either the *de jure* authority to issue them operational orders or the *de facto* authority to control how they carried out their missions. On the other hand, Bagambiki was found to be the direct supervisor of Bourgmestre Kamana and the Kagano commune police, both of whom had participated in an attack against refugees at Nyamasheke. Although there was no evidence that Bagambiki knew about the attack before it happened, the Chamber found that he should have known of Kamana's participation due to Kamana's possession of looted items. With regard to the Kagano police, however, the Chamber found that it lacked sufficient evidence to determine if he should have known about their involvement. The Chamber noted that in suspending Kamana for his actions Bagambiki had exercised the apparent extent of his disciplinary powers under the law. Consequently, the Chamber determined that the Prosecutor had not shown that Bagambiki had failed to take "necessary and reasonable measures" to punish Kamana for his role in the attack. As a result, Bagambiki was found not to have superior responsibility for the Nyamasheke massacre.

Bagambiki and Imanishimwe were both found to have received a list of names of people who were suspected to have connections with the rebel Rwandan Patriotic Front (RPF) from persons who were threatening to attack the Kamarampaka Stadium. The Chamber, however, lacked sufficient evidence to determine whether either of the accused had participated in the preparation of the lists or provided them to the attackers. Bagambiki and Imanishimwe discussed the names on the list with other members of the prefectural security council and removed 16 Tutsis and

one Hutu opposition leader from the Kamarampaka Stadium and Cyangugu Cathedral for questioning. Most of these persons were subsequently killed. They also removed several persons from the Gashirabwoba football field, one of whom was later found dead. Nevertheless, the Chamber found that it lacked sufficient evidence to determine that either accused bore criminal responsibility for these deaths. Judge Williams dissented from this view based on the belief that the circumstances surrounding the crime, including the fact that Bagambiki handed the victims over to soldiers who had been involved in an earlier massacre at the Gashirabwoba field, demonstrated that Bagambiki substantially contributed and consented to their deaths as an aider and abetter. Although the Chamber also found that Bagambiki escorted refugees from the cathedral to the stadium, it found that it had not been proven that the refugees were then forcibly prevented from leaving or were executed at the stadium. The Chamber found Bagambiki not guilty on all charges based on its determination that Bagambiki could not be held responsible as a superior for the acts of his subordinates at the Nyamasheke massacre.

Imanishimwe was the commander of the Karambo military camp. He testified both to his role in the command structure and to particular instances in which he had issued orders to, deployed, and disciplined soldiers from the camp. Consequently, he was found to have both *de jure* authority and effective control over them. The Chamber further found that he either knew or should have known that some of these soldiers surrounded and killed a group of refugees at the Gashirabwoba football field after determining that they were Tutsi. Not only had he visited the football field, but "[g]iven the relatively small size of the camp, Imanishimwe's control over his soldiers, and the fact that he remained in regular contact with his soldiers stationed away from the camp, the Chamber [could] not accept that fifteen or more soldiers would have participated in such a systematic, large-scale attack without the knowledge of their commander." Further, there was no evidence that Imanishimwe had attempted either to prevent the attack or to punish any of the soldiers who participated.

The Chamber found from the context of the massacre, as well as the many other attacks taking place in Cyangugu at the time, that the soldiers had intended to destroy the Tutsi group. As a consequence,

Imanishimwe was found guilty of superior responsibility for genocide. Because the charge of complicity in genocide was based on the same facts as his conviction for genocide, he was found not guilty on this count.

The massacre at the football field was also found to have been part of a systematic attack on political grounds against civilians suspected to have had connections to the RPF. This political attack was related to a widespread attack on ethnic grounds against the Tutsi population of Cyangugu as a whole. Both the soldiers and Imanishimwe were found to have been aware of these attacks. Imanishimwe was held responsible as a superior for the crime against humanity of murder because the killings at Gashirabwoba were intentional. The Chamber, however, decided that a conviction for the crime against humanity of extermination provided a better or more complete description of Imanishimwe's criminal conduct because a substantial number of refugees had been killed.

Regarding the killing of several other individuals, including at least one Hutu, the Chamber found that it lacked evidence that the soldiers had acted with genocidal intent because the evidence indicated that the victims were targeted due to their suspected association with the RPF (and thus on political rather than ethnic grounds). Imanishimwe was consequently not found responsible for genocide for these acts. Instead, because the Chamber inferred that Imanishimwe had issued an order "authorizing the arrest, detention, mistreatment, and execution of individuals with suspected connections to the RPF...[.]" he was found guilty for the crimes against humanity of imprisonment and murder. Moreover, he was found guilty of both ordering and aiding and abetting the torture of several civilian detainees who had been mistreated in his presence. Notably, with regard to two of the detainees, the Chamber found that although they were severely beaten and threatened with death their mistreatment "was not such as to cause severe suffering or pain sufficient for a finding of torture" because they were able to forcibly escape by pushing past two guards who were hitting them.

Based on the same underlying facts as his convictions for genocide and crimes against humanity, Imanishimwe was also found guilty of serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II, including "violence to life, health and physical or mental well-being of persons,

in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment.” The Chamber noted that many of the victims, although not taking a direct part in the hostilities at the time of the violations, were accused of ties to the RPF. Moreover, “the soldiers’ actions were [either] motivated by their search for enemy combatants and those associated with them” or, as in the attack at the Gashirabwoba football field, “carried out under the pretext of such a search.” Consequently, Imanishimwe was found guilty of superior responsibility for the intentional killing of the refugees at the Gashirabwoba field by soldiers under his effective control. Moreover, he was found to have been individually responsible for ordering the murder of several civilians and for both ordering and aiding and abetting the torture and cruel treatment of several others.

INTERNATIONAL CRIMINAL COURT

DARFUR

On June 29, 2005, the International Criminal Court’s (ICC) Chief Prosecutor, Luis Moreno-Ocampo, addressed the Security Council pursuant to UN Security Council Resolution 1593 (2005), which referred the case of Darfur to the Court. A written report was also submitted to provide further details on the current status of the ICC’s investigation.

The ICC began a formal investigation into the crimes committed in Darfur in June 2005. Under the Rome Statute (Statute), the Prosecutor must initiate an investigation referred to the Court by the Security Council or a State Party unless there is no reasonable basis to proceed. This determination is based on the consideration of three factors set out in article 53(1) of the Rome Statute:

- (a) The information available provides a reasonable basis to believe that a crime within the jurisdiction of the Court has or is being committed;
- (b) The case is admissible under article 17; and
- (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

The Office of the Prosecutor (OTP) received information compiled by the

International Commission of Inquiry on Darfur. In addition, the OTP has collected more than 3,000 documents from a variety of sources and has been in contact with over 100 groups and individuals that have provided detailed accounts of the human rights violations perpetrated in Darfur. Based on this information the OTP concluded that there is a “reasonable basis” to believe that crimes have been committed in the region that fall within the Court’s jurisdiction. According to Moreno-Ocampo, there is no doubt that grave crimes within the jurisdiction of the Court have taken place in Darfur.

Article 17 of the Rome Statute requires the Court to consider the principle of complementarity before it can initiate an investigation. Under this principle the Court only has jurisdiction when a state is found to be unwilling or unable to genuinely investigate or prosecute a crime within the jurisdiction of the Court. The OTP studied the Sudanese laws, institutions, and procedures, including *ad hoc* mechanisms created in 2004 to address the conflict in Darfur. The ICC Prosecutor concluded there were cases that had not yet been prosecuted in Sudan and over which the ICC would therefore have jurisdiction. The OTP also considered issues relating to the interests of justice as required by Article 53(1)(c). The Prosecutor found that an investigation would not be contrary to the interests of justice. A formal investigation was therefore initiated on June 1, 2005.

In early June, after the initiation of the ICC investigation, the government of Sudan established a specialized tribunal to prosecute some of the individuals responsible for crimes committed in Darfur. Under the rules of complementarity the ICC is prohibited from proceeding with cases that are being genuinely investigated or prosecuted in Sudan. In his report submitted to the Security Council, Prosecutor Moreno-Ocampo stated that he would follow the work of the Sudanese tribunal as part of the ongoing determination of admissibility under the principle of complementarity.

Prosecutor Moreno-Ocampo also commented on the continuing challenges related to the protection of victims and witnesses, especially in light of the current security risks to civilians and humanitarian personnel in Darfur. He noted that the dissemination of information about ICC activities will help guarantee the participation of victims and witnesses in the process, and expressed con-

fidence that conducting these proceedings in the region would encourage broader local involvement. The Prosecutor concluded his statement to the Security Council by emphasizing the importance of using existing tribal and traditional systems to promote a productive process of dispute resolution and to advance the rule of law in the region.

NORTHERN UGANDA

On October 13, 2005, the International Criminal Court unsealed its first arrest warrants. The warrants were issued under seal by Pre-Trial Chamber II in July to ensure the safety and well-being of victims, potential witnesses, and their families, as well as to prevent the disclosure of their identity or whereabouts. The Chamber’s decision to unseal the arrest warrants came after it was satisfied that a security plan had been implemented in Uganda for the victims and witnesses, and after assessments from the Prosecutor and the Victims and Witness Unit that the plan provides adequate protective measures for “all concerned at this stage.”

To issue arrest warrants the Chamber must conclude that there are reasonable grounds to believe that the accused have committed crimes within the jurisdiction of the Court. Warrants of arrest were issued against five senior leaders of the Lord’s Resistance Army (LRA) for crimes against humanity and war crimes committed in Uganda since July 2002. The warrants allege that the LRA “has established a pattern of brutalization of civilians by acts including murder, abduction, sexual enslavement, mutilation, as well as mass burnings of houses and looting of camp settlements.” The warrant for Joseph Kony (the leader of the LRA) lists 33 criminal counts, including 12 counts of crimes against humanity and 21 counts of war crimes. Vincent Otti is accused of 32 criminal counts, including 11 counts of crimes against humanity and 21 counts of war crimes. Okot Odhiambo is accused of 10 criminal counts, including two counts of crimes against humanity and eight counts of war crimes. Dominic Ongwen’s warrant lists seven criminal counts, including three counts of crimes against humanity and four counts of war crimes. The warrant of arrest for Raska Lukwiya lists four criminal counts, including one count of crimes against humanity and three for war crimes.

Notifications of the warrants went out earlier in October to Uganda, Sudan (which

the LRA has used the southern region of as a base), and Congo. States that have ratified the ICC statute are obliged to arrest those against whom warrants have been issued. Uganda and Congo, but not Sudan, have ratified the statute. In September, a group of LRA fighters, including Vincent Otti, fled into the region of Congo that borders Uganda. Kinshasa and the UN have said they are deploying forces to the area where the LRA rebels are believed to be hiding.

DEMOCRATIC REPUBLIC OF CONGO

On September 13-14, 2005, representatives of the ICC participated in an information session held in Kinshasa and organized by the "Congolese Coalition for the ICC." The event provided basic information on the ICC and Deputy Prosecutor Serge Brammertz delivered a presentation on the methodology of ICC investigations. Participants also learned about the work of the Registry, which is responsible for the non-judicial aspects of the Court's administrative services, including working with victims and witnesses. Victim and witness participation in the Court is considered crucial to its success. The recently opened field office in Kinshasa is tasked with raising awareness of the work of the ICC and increasing local involvement in the activities of the Court.

WORKING GROUP ON THE CRIME OF AGGRESSION

The Special Working Group on the Crime of Aggression of the Assembly of States Parties to the ICC held an inter-sessional meeting from June 13-14, 2005, at Princeton University. The purpose of the meeting was to facilitate the process of defining the crime of aggression. The group hopes to reach a definition in time to be incorporated into the Rome Statute in 2009, the first time that amendments to the Statute can be considered. Although the crime of aggression is currently listed under the jurisdiction of the ICC, the Court cannot exercise jurisdiction over this crime until a definition is agreed upon by the State Parties. States Parties, as well as non-parties to the Statute have been allowed to participate in the working group, because of the importance of arriving at an internationally recognized definition of the crime of aggression. A complete review of the session is available at http://www.icc-cpi.int/library/asp/ICC-ASP-4-SWGCA-INF1_English.pdf.

RATIFICATIONS

On May 12, 2005, the Dominican Republic ratified the Rome Statute and on October 28, 2005, Mexico became the 100th State Party to the ICC. A ceremony was held at the United Nations Headquarters to mark this historic event.

THE EXTRAORDINARY CHAMBERS OF THE COURTS OF CAMBODIA FOR THE PROSECUTION OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA

THIS YEAR CAMBODIA planned to launch the Extraordinary Chambers of the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (ECDK), but many setbacks have postponed the ECDK's opening session.

Fiscal constraints have made the Cambodian government reluctant to begin prosecutions. When the United Nations established the ECDK, the international community and Cambodia agreed to share the costs, with the international community providing \$43,000,000 and Cambodia covering the remaining \$13,000,000. Since then Cambodia has said it cannot afford to pay more than \$1,500,000. The tribunal is now seeking more donors and funding to begin its work. In October 2005 India contributed \$1,000,000 to the Cambodian government that was earmarked for the ECDK.

The process for nominating presiding judges of the tribunal is also taking longer than expected. In August 2005 the ECDK closed nominations for national judges, but the Cambodian government must still review and certify these nominations. The court is also awaiting the confirmation of international judges, which UN Secretary-General Kofi Annan is expected to complete by the end of October. Although the ECDK will be composed primarily of Cambodian judges, the court will need the vote of at least one international judge to indict defendants. Finally, Khmer Rouge Trial Coordinator Michelle Lee, appointed in August 2005, has not yet assumed office, creating further delays in the proceedings.

Despite those who suggest such delays will prevent the ECDK from ever commencing, the tribunal has made some progress toward beginning its mandate. In June 2003 the ECDK announced that a military facility 11 miles outside the Cambodian capital of Phnom Penh would host the tribunal. The United Nations, con-

cerned that this location will not be easily accessible to the public, has pressured the Cambodian government to provide adequate public transportation to and from the site. Public participation in the tribunal is an essential element in lending legitimacy to the proceedings in Cambodia and abroad. The ECDK has also enumerated its priorities, including the selection of judges and prosecutors, the creation of an oversight committee, the establishment of internal regulations, the development of investigative capacity, the creation of programs for outreach and training, the protection of victims and witnesses, and the establishment of an accounting system.

THE SPECIAL COURT OF SIERRA LEONE

THE UNITED NATIONS AND SIERRA LEONE established the Special Court of Sierra Leone to try violators of international humanitarian law during the devastating civil war that gripped the country from 1991 to 1999. With a mandate to examine cases regarding crimes committed after November 30, 1996, the Court consists of two trial chambers, and hears a total of three cases concurrently.

The Court initially indicted 13 people on various charges of war crimes and crimes against humanity, including murder, rape, extermination, acts of terror, enslavement, looting and burning, sexual slavery, and the conscription of children into an armed force. Although the Court dropped the indictments against Foday Sankoh and Sam Bockarie after their deaths, nine indictments are currently active. The two inactive indictments are those of Charles Taylor, the former Liberian President currently in exile in Nigeria, and Johnny Paul Koroma, who remains at large.

This year has seen many important changes in the composition of the Court. On February 28, 2005, Prosecutor David M. Crane announced he would not seek reappointment following the expiration of his term on July 15th. On May 26, 2005, the Court announced the election of Justice Raja Fernando of Sri Lanka as Presiding Judge of the Appeals Chamber. This election also makes Judge Fernando President of the Special Court for one year, succeeding Emmanuel Ayoola of Nigeria. Also in May, Justice Pierre G. Boutet of Canada was elected to a one-year term as Presiding Judge of Trial Chamber I, succeeding Justice Benjamin Itoe of Cameroon. On June 6, 2005, Vincent O. Nmehielle was named the Court's Principal Defender and on July 11th, Dr. Christopher Staker was appointed by the UN Secretary-General, in consultation with

the government of Sierra Leone, to the position of Deputy Prosecutor. Staker follows Desmond de Silva, who was promoted to the position of Chief Prosecutor. The most recent announcement from the Special Court is that Justice Robertson, the first President of the Special Court, will serve as its new Vice-President for the next four months. He succeeds Justice George Gelaga King in this capacity. It is expected that Justice Renate Winter will assume the same post in January 2006.

TRIAL CHAMBER I

Trial Chamber I currently oversees cases against Civilian Defense Forces (CDF) members Sam Hinga Norman, Moinina Fofana, and Allieu Kondewa, and cases against Revolutionary United Front (RUF) members Issa Hassan Sesay, Morris Kallon, and Augustine Gabo.

Trial Chamber I began in 2005 by continuing to hear the Prosecution's case against the CDF members. In just under 100 days of proceedings, the Prosecution laid out its case for charges of murder, the systematic looting and burning of villages, the recruitment of child soldiers, and the targeted slaughter of specific groups, including police officers. The case against the accused was concluded July 14, 2005, after testimony by 75 witnesses. On September 20th, the court heard oral arguments on the CDF's defense motions for acquittal, with Justice Pierre Boutet presiding. The Defense's case is expected to last well into 2006.

Trial Chamber I is now also hearing the case against the RUF members, indicted on 18 counts for terrorizing the civilian population, collective punishments, unlawful killings, sexual and physical violence, the use of child soldiers, abductions and forced labor, looting, burning, and attacks on UN personnel. As of July 14, 2005, a little more than a year after the RUF trial began, 39 witnesses had testified.

TRIAL CHAMBER II

Trial Chamber II hears the case against Armed Forces Revolutionary Council (AFRC) members Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu, indicted on 14 counts for crimes, including collective punishment and the terrorizing of civilians through killing, looting and burning, sexual and physical violence, forced abductions and labor, and the enslavement of children as soldiers.

TIMELINE

Based on the time needed for court administration and witness testimony, Chief Justice Fernando predicts that the cases involving CDF and the AFRC will conclude the trial chamber stage in late 2005 or early 2006. With an estimated 4-6 months for appeals, the full process could be complete by mid-2006. Chief Justice Fernando estimates that the RUF trial will finish the chamber stage by the end of 2006; the appeals stage should conclude by early- to mid-2007. In accordance with international law and human rights treaties, the Prosecution is not seeking the death penalty; any convictions will result in prison sentences.

THE IRAQI SPECIAL TRIBUNAL

THE IRAQI GOVERNING COUNCIL formed the Iraqi Special Tribunal (IST) following Saddam Hussein's capture in December 2003. The Tribunal's mandate is to prosecute high-level members of the former government accused of crimes against humanity, war crimes, and acts of genocide that took place between July 16, 1968, and May 1, 2003.

Although the IST was modeled on the International Criminal Court and national tribunals, which have traditionally not granted the forum state much control over the judicial proceedings, Iraq has retained a great deal of power over the functions of the IST. While seeking to comply with international legal standards, the Iraqi Governing Council established IST statutes in line with Iraqi law and in consultation with its own legal committee, as well as other experts and Coalition Provisional Authority officials. The Tribunal also works concurrently with national courts. Iraq recognizes the weaknesses of its legal infrastructure, however, and has agreed to consult international expert advisors during the process — though decision-making power still rests in the hands of Iraqis. Judges on the Tribunal must hold Iraqi citizenship, unless specifically approved by the Iraqi Judicial Council.

Although the court does not require proof of guilt beyond a reasonable doubt, the IST has the power to impose sentences ranging from a minimum of five years imprisonment to a maximum of the death penalty. In September 2005 the government carried out the IST's first death sentences, hanging three men convicted of murder. As a result, the United Nations and many European Union members have refused to support the Tribunal's work.

The trial of Saddam Hussein, who is currently charged with the 1982 massacre of 143 Shi'a villagers in Dujail following a failed assassination attempt, began on October 19, 2005. Hussein's seven co-defendants were among his closest aids, and include Barazan Ibrahim, Hussein's half brother and former intelligence chief; Taha Yassin Ramadan, former Vice President; and Awad Hamed al-Bandar, former Ba'ath party official in Dujail. Although the trial against Hussein is presided over by five judges, only Presiding Judge Rizgar Mohammed Amin has revealed his identity. The identities of the other judges have been withheld for their safety. The proceedings will be conducted in private, and only a small number of observers and journalists will be allowed to watch the trial on a closed circuit television.

At the start of the proceedings against him, Hussein refused to state his name for the record, questioning the Court's jurisdiction and legitimacy. He ultimately entered a plea of not guilty. When guards moved to restrain Hussein as he attempted to leave the room during a break, an altercation ensued. Khalil al-Dulaimi, Hussein's lawyer, has requested a three-month delay to continue to prepare a defense for the former leader. At the end of the three-hour session, the court adjourned until November 28, 2005. In all, Hussein, is expected to face about a dozen trials for crimes allegedly committed by his former regime. If convicted, he is expected to receive the death penalty, likely by hanging or firing squad because he was a military officer. **HRB**

Mariam Ahmedani, a J.D. candidate at the Washington College of Law, covers the ICTY and the ICC for the Human Rights Brief.

Christina Barba, a J.D. candidate at the Washington College of Law, wrote the Prosecutor v. Ndingabazizi summary for the Human Rights Brief.

Brianne McGonigle, a J.D. candidate at the Washington College of Law, wrote the Prosecutor v. Ntagerura, Bagambiki, and Imanishimwe summary for the Human Rights Brief.

Anne Heindel, Assistant Director of the War Crimes Research Office at the Washington College of Law, edited both ICTR summaries for the Human Rights Brief.

Leslie Thompson, a J.D. candidate at the Washington College of Law, covers international criminal issues for the Human Rights Brief.