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Updates from the International Criminal Courts

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UPDATES FROM THE INTERNATIONAL CRIMINAL COURTS

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

PROSECUTOR V. STANISLAV GALIC, CASE NO. IT-98-29-T

On December 5, 2003, Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia (ICTY) delivered its judgment in the case of *Prosecutor v. Stanislav Galic*. The indictment charged General Galic with attacking and inflicting terror on civilian populations as violations of the laws and customs of war as well as murder and other inhumane acts as crimes against humanity. The seven-count indictment focused on Galic's alleged acts of sniping and shelling in and around Sarajevo from September 1992 to August 1994.

During the period covered in the indictment, General Galic was a commander of the Sarajevo Romanija Corps (SRK), a branch of the Army of Republika Srpska (VRS), which was embroiled in armed conflict with the Army of Bosnia-Herzegovina (ABiH). The Prosecution alleged that Galic was criminally responsible for a campaign of sniping and shelling attacks on civilians in the parts of Sarajevo controlled by ABiH with the primary purpose of inflicting terror. The Prosecution claimed that this campaign resulted in a large number of deaths and injuries to civilians. The Defense contested the allegations, claiming that the civilian casualties were collateral to legitimate military activity and resulted from the targeting errors and stray bullets of both warring factions.

The Trial Chamber heard the testimony of 171 witnesses and viewed a large number of visual exhibits. The group of witnesses included victims of the attacks, international military personnel stationed in Sarajevo, and members of the armed forces of both parties to the conflict. The majority found that civilians in Sarajevo were attacked generally during the day and that the attacks were not in response to any military threat. In addition, the majority determined that the attackers could easily tell that their victims were engaged in everyday civilian activities. These findings fulfilled the requirements for the chapeau elements of vio-

lations of the laws of war. In addition, the majority found that hundreds of civilians were killed and thousands were injured in these attacks in the two-year period covered in the indictment. Although Judge Nieto-Navia authored a lone dissent, the majority found that the attacks were part of a widespread and systematic campaign against civilians, fulfilling the chapeau requirements for crimes against humanity. In essence, the majority found that the SRK forces were guilty of each of the crimes alleged in the indictment and stated that it only had to rule on General Galic's responsibility in those crimes.

The majority found General Galic guilty of the crime of terror and dismissed the charges of attacks of civilians as violations of the laws of war. Both of these crimes are prohibited by Article 51 of Additional Protocol I to the Geneva Conventions of 1949 and were read into the ICTY Statute under the expansive capability of Article 3. The majority noted that this was the first time it had to pronounce on the material and mental elements of the crime of terror. The crime of terror has the same legal elements as the crime of attack on civilians, plus an additional mental element requiring that the main purpose of the act be to spread terror among the civilian population. Since the law on cumulative convictions prohibits multiple convictions under different articles of the statute for the same facts, and favors a conviction under the more specific provision, the majority dismissed the charges of attacks on civilian populations and upheld the conviction of terror as a violation of the laws of war.

The majority next considered Galic's responsibility in the crimes SRK committed during the period covered in the indictment. The majority stated that the sniping and shelling activity of the SRK was under the control of SRK's chain of command and that Galic had the authority to punish those who contravened his orders, violated military discipline, or committed crimes. The majority thus found that Galic had "effective control" of SRK troops. In addition, the majority found that Galic was well aware of the unlawful activities of his troops. However, the majority noted that Galic not only knew of the activities of his sub-

ordinates, but controlled the pace and scale of those crimes. This finding was made based on several testimonies that after pressure had been applied to General Galic to stop the shootings, they would occur less frequently. However, the shootings would again increase in intensity as the pressure abated. Finally, the majority found that Galic occupied a position of corps commander in the VRS, a very senior position of public trust and duty, and repeatedly breached that duty and trust, which counted as an aggravating factor in determining his punishment. The majority sentenced General Galic to a single term of 20 years' imprisonment, with credit for the time spent in detention.

The judgment in this case is important because it is the first time a conviction for the crime of terror has been issued by the ICTY. Article 3 of the Statute includes violations of the laws of war, enumerating some specific crimes but leaving open the possibility for the tribunal to prosecute others not appearing in the Statute. Although terror is not specifically listed in the Statute, the ICTY can prosecute it based on its inclusion in the Geneva Conventions. Such a reading gives the ICTY considerable flexibility in prosecuting criminals. It is unrealistic to expect that the drafters of a tribunal statute will foresee all of the potential crimes that may need to be adjudicated. The ability to expand to fit different crimes and circumstances will make the effective prosecution of more crimes possible under international criminal law.

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

PROSECUTOR V. JEAN DE DIEU KAMUHANDA, CASE NO. ICTR-95-54A-T

On January 22, 2004, Trial Chamber II of the International Criminal Tribunal for Rwanda (ICTR) delivered its judgment in the case of *Prosecutor v. Jean de Dieu Kamuhanda*. The original nine-count indictment charged Kamuhanda with conspiracy to commit genocide; genocide; complicity in genocide; murder, extermination, rape and other inhumane acts as crimes against humanity; and outrages of personal dignity, killing, and violence as serious

violations of Common Article 3 and Optional Protocol II to the Geneva Conventions. Kamuhanda was charged with individual criminal responsibility under articles 6(1) and 6(3) of the ICTR Statute for all the above-mentioned crimes. Kamuhanda was arrested in the French town of Bourges in November 1999 on a warrant from the ICTR, the first such arrest in France. On August 20, 2002, following the end of the Prosecution's case, the Trial Chamber partly granted a Defense motion and entered a judgment of acquittal in the charge of conspiracy to commit genocide.

Analysis

Between January 1, 1994, and July 17, 1994, the period covered by the Indictment, there were widespread attacks against the ethnic Tutsis in Rwanda, especially beginning on April 6, 1994. The Prosecution argued that Kamuhanda played a role in the April 1994 massacres of Tutsi refugees in the Gikomero Parish Compound and Gishaka Catholic Parish. The Prosecution stated that Kamuhanda had distributed firearms, grenades, and machetes to civilian militia on several occasions and was an influential member of the Republican Movement for National Democracy and Development (MRND), a Hutu extremist political group and militia. The Prosecution also charged that Kamuhanda was responsible for rapes of Tutsi refugees before their murders committed during the same attacks.

Next, the Trial Chamber ruled that the Prosecution failed to present specific evidence of a superior-subordinate relationship between Kamuhanda and the militias involved in the attacks in question to show that he had "effective control" of the latter under 6(3) of the ICTR Statute, which covers superior criminal responsibility. The Trial Chamber noted that this was not inconsistent with the finding under 6(1) that Kamuhanda had "ordered" the attacks. The Chamber noted that the two categories for responsibility were distinct and it would only consider the elements of individual criminal responsibility in this case.

The Trial Chamber found Kamuhanda guilty of genocide and dismissed the charge of complicity in genocide. The Chamber noted that Kamuhanda exhibited "intent to destroy, in whole or in part" the Tutsi ethnic group by addressing a meeting at the home of one of his cousins at the Gikomero compound, inciting those attending the meeting to start killing

Tutsis, and telling them that he would return to start the killings. The Chamber found that Kamuhanda returned on the afternoon of April 12, 1994 and verbally ordered the killings to start. The Chamber found Kamuhanda guilty beyond a reasonable doubt of instigating, ordering, and aiding and abetting the killing of members of the Tutsi ethnic group in the Gikomero Compound, and therefore guilty of genocide. Because of this finding and the rule on cumulative convictions discussed above, the Chamber could not find Kamuhanda also guilty of complicity in genocide on the same facts, and the charge was dismissed.

The Trial Chamber found Kamuhanda guilty of extermination as a crime against humanity, not guilty of rape and other inhumane acts as crimes against humanity, and dismissed the count of murder as a crime against humanity. The Chamber found that the attacks on Tutsi refugees during April 1994 occurred on a mass scale and that this constituted a widespread and systematic attack against a civilian population for purposes of the chapeau elements of Article 3 of the Statute. Next, the Chamber ruled that there was insufficient distinction between the general allegations of murder and extermination. Further, because of the law relating to cumulative convictions, the charge of murder was thereby dismissed. The Chamber noted that extermination requires an element of mass destruction, and that a single killing or a limited number of killings will not be sufficient. The Chamber also noted that the attack must be directed against a group, rather than specific individuals, and that the killings at Gikomero compound satisfied this requirement. In addition, Kamuhanda participated in the attack and was fully aware that his actions formed part of the widespread attack, therefore, the Chamber found him guilty of extermination as a crime against humanity. Finally, the Chamber found the evidence adduced in support of the allegation of rape and other inhumane acts was not sufficient to prove beyond a reasonable doubt that Kamuhanda was individually criminally responsible for those acts.

The Trial Chamber then considered the requirements for applicability of serious violations of the Geneva Conventions: that Kamuhanda committed the alleged crimes against persons not taking active part in the hostilities, the alleged acts were committed in the context of an internal armed conflict, and that a nexus existed between the alleged acts

and the armed conflict. The Chamber noted that under this charge, it was necessary for the Prosecution to prove that Kamuhanda was a member of the armed forces or that by virtue of his authority as a public civilian official, he was mandated or expected to support the war efforts. The Chamber then stated that the Prosecution failed to show how and in what capacity Kamuhanda supported the government effort against the Rwanda Patriotic Front (RPF). Therefore, there was no requisite nexus between Kamuhanda's alleged crimes and the armed conflict and the Trial Chamber found Kamuhanda not guilty of serious violations of the Geneva Conventions.

Conclusion

The Trial Chamber, having found Kamuhanda guilty of genocide and extermination as a crime against humanity, considered the appropriate sentence. It found no mitigating factors, despite the fact that Kamuhanda was widely regarded as a good man who had done much to help his commune and country. The Chamber then found that the high position Kamuhanda held as a civil servant and an intellectual an aggravating factor especially because he should have known and appreciated the dignity and value of life and the peaceful coexistence between communities. Therefore, the Trial Chamber sentenced Kamuhanda to two terms of life imprisonment for genocide and extermination as a crime against humanity.

This case is noteworthy because it is the third conviction of a Minister of the government of Rwanda, reinforcing the ICTR's commitment to prosecuting those most responsible for the genocide in Rwanda regardless of rank or position in society and further chipping away at the principle of sovereign immunity traditionally accorded to state officials. Finally, Kamuhanda was arrested and extradited from France to the ICTR, which shows the level of cooperation UN member states have contributed to secure prosecutions of war criminals and ensure accountability and the proper functioning of the international tribunals.

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