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The War Crimes Research Office Presents: News from the International Criminal Tribunals

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THE WAR CRIMES RESEARCH OFFICE PRESENTS: NEWS FROM THE INTERNATIONAL CRIMINAL TRIBUNALS

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edited by Susana SáCouto*

International Criminal Tribunal for Rwanda Appeals Chamber

Alfred Musema v. The Prosecutor, Case No. ICTR-96-13-A

On January 27, 2000, Trial Chamber I found Alfred Musema guilty of genocide and crimes against humanity (for extermination and rape) but not guilty of complicity in genocide, conspiracy to commit genocide, crimes against humanity (for murder and other inhumane acts), or violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. The Trial Chamber sentenced Musema to life imprisonment. Musema appealed both the conviction and the sentence. On November 16, 2001, the Appeals Chamber rendered its Judgment in *Alfred Musema v. The Prosecutor*, Case No. ICTR-96-13-A.

Musema's first ground of appeal alleged that the Trial Chamber failed to apply the correct burden and standard of proof to the facts before it and, thereby, made errors of law and fact in its assessment of the evidence. In particular, Musema challenged the Trial Chamber's findings with regard to the credibility of Prosecution witnesses and took issue with the Trial Chamber's rejection of the alibi he raised at trial. The Appeals Chamber dismissed all of Musema's arguments except those regarding the rape of Nyiramasugi on May 13, 1994. With respect to that charge, the Appeals Chamber noted that the Defense's submission of out-of court statements by Witnesses CB and EB contradicted Prosecution Witness N's testimony during trial. The Appeals Chamber found that if the testimonies of all three witnesses had been presented, a reasonable tribunal of fact would have reached the conclusion that there was reasonable doubt as to Musema's guilt. The Appeals Chamber concluded that the Trial Chamber's factual and legal findings regarding the rape of Nyiramasugi were incorrect and had occasioned a miscarriage of justice. Accordingly, it quashed the conviction against Musema for the crime against humanity involving rape.

In his second, fourth, and fifth grounds of appeal,¹ Musema argued that the Trial Chamber did not ensure his right to a fair trial in that it failed to respect his right to be informed promptly and in detail of the nature of the charges against him, his right to have adequate time for the preparation of his defense and, lastly, his right to be tried without undue delay. Specifically, in his second ground of appeal, Musema claimed that his right to adequate time for the preparation of his defense was prejudiced by the Trial Chamber's decision to allow the Prosecution to add witnesses to the initial witness list, to call an expert witness, and to call witnesses whose written statements were not disclosed to the Defense 60 days before the trial date, as required by the ICTR Rules of Procedure and Evidence. The Appeals Chamber dismissed Musema's argument, holding that Musema had waived his right to appeal this issue by failing to raise it at trial.

In the fourth ground of his appeal, Musema alleged that the Trial Chamber erred by allowing the Prosecution to add new charges to the Indictment during the trial. In the fifth ground, Musema alleged that the Trial Chamber erred by finding that the Prosecution's failure to formally serve him with the Amended Indictment did not infringe his rights under Articles 19 and 20 of the ICTR Statute. The Appeals Chamber deemed it unnecessary to consider these last two grounds of appeal since both concerned Count 7 of the Indictment

(crime against humanity for rape), which was quashed based on Musema's first ground of appeal. However, the Appeals Chamber observed in dicta that when granting the Prosecution leave to amend an indictment, the Trial Chamber must respect the Accused's fundamental rights and "the more belatedly the amendment is effected, the more it is likely to penalize the Accused."

In his sixth ground of appeal, Musema argued that the Trial Chamber erred in finding him guilty of both genocide and crimes against humanity (for extermination) based on the same set of facts. In addition to ruling that cumulative charging of offenses is generally permitted, the Appeals Chamber applied the criteria discussed in the *Čelebići* ICTY Appeal Judgment to determine when multiple convictions based on the same set of facts may be entered or affirmed. Quoting from *Čelebići*, the Appeals Chamber stated that: "multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other." Applying the *Čelebići* test, the Appeals Chamber held that the convictions for genocide and crimes against humanity (extermination) are permissible since there are distinct elements under each crime. The distinct element in genocide is an intent to destroy a targeted group in whole or in part. Extermination as a crime against humanity requires proof that the act form part of a widespread or systematic attack against a civilian population. Thus, the Appeals Chamber dismissed Musema's sixth ground of appeal.

In his appeal against the sentence, Musema argued that the Trial Chamber erred by failing to: 1) consider the need to develop a range of sentences based on an accused's role in the broader context of Rwanda's conflict; 2) pass a sentence commensurate with other sentences imposed by the ICTR for genocide convictions; and 3) duly consider the mitigating factors in his case. Articulating the standard of review for sentences imposed by the ICTR, the Appeals Chamber noted that it would not revise a sentence unless it believed that the Trial Chamber had committed a "discernible error" in exercising its discretion, or failed to follow the applicable law. While acknowledging the existence in ICTY jurisprudence of a general principle that sentences should be graduated according to the relative position of a convicted person in a command structure, the Chamber emphasized that the gravity of the offense is the primary consideration in imposing sentence. Noting that Musema's offenses were of the utmost gravity, the Appeals Chamber found that Musema had failed to demonstrate that the Trial Chamber ventured outside its "discretionary framework in imposing the maximum sentence of life imprisonment" and dismissed Musema's first argument. After an assessment of the aggravating and mitigating circumstances in Musema's case, the Appeals Chamber found material differences between his case and that of *Serushago*, who plead guilty to one count of genocide and three counts of crimes against humanity (murder, extermination, and torture), and dismissed his second argument. In response to his third argument, the Appeals Chamber found that Musema failed to demonstrate that the Trial Chamber erred in exercising its discretion as to the weight accorded to

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the mitigating circumstances in his case. In affirming the sentence, the Appeals Chamber noted that the quashing of the conviction for the crime against humanity (for rape) had no impact on its dismissal of Musema's appeal, as "[t]here is no doubt that the Trial Chamber's findings as to the sentence to be imposed on Musema would have been the same if it had acquitted Musema of the charge in question."

Judge Shahabuddeen supported the judgment but wrote separately to clarify his understanding of two issues: 1) the reliability of evidence; and 2) the test for upholding a conviction based on additional evidence admitted during appellate proceedings. He stated that in general, the credibility of evidence must be assumed, rather than assessed, at the admissibility stage; reliability is a component of credibility and, as such, goes to weight of the evidence and must be assessed later. However, a different rule applies with respect to hearsay evidence. Because of its nature, hearsay evidence may require an initial determination of reliability at the admissibility stage. Even then, ICTY jurisprudence demonstrates that definitive proof of reliability is not necessary as a condition of admissibility; rather provisional proof is all that is required at that stage. Secondly, Judge Shahabuddeen noted that the test for upholding a conviction based on additional evidence submitted at the appellate level should be whether such evidence could have been a decisive factor in reaching the decision below, not whether the conclusion reached by the tribunal below on the assessed evidence was one which no reasonable tribunal would have reached on that evidence.

The Prosecutor v Clément Kayishema and Obed Ruzindana Appeal, Case No. ICTR-95-1-A

On May 21, 1999, the Trial Chamber rendered its judgment in the case of Clément Kayishema and Obed Ruzindana, who were both accused of involvement in the massacres that took place in the *prefecture* of Kibuye in 1994. The Trial Chamber convicted Clément Kayishema of four counts of genocide and sentenced him to life in prison. Obed Ruzindana was convicted of one count of genocide and sentenced to 25 years imprisonment. The Trial Chamber found the accused not guilty of crimes against humanity, finding that those charges were fully subsumed by the counts brought under the charge of genocide, and acquitted the accused of violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. Both accused appealed the conviction and the sentence. The Prosecution appealed the judgment and sentence against Ruzindana. On June 1, 2001, the Appeals Chamber rendered its judgment in the case of *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A.

In his appeal, Kayishema argued that the trial was unfair and that the Trial Chamber erred in its: 1) assessment of his role as *préfet*; 2) evaluation of his individual and command responsibility as *préfet*; 3) assessment of the meaning and application of civil defense to the Rwandan conflict; and 4) findings and application of the law regarding the crime of genocide. Ruzindana also claimed that the trial was unfair. In addition, he alleged that the Trial Chamber erred in law and fact with respect to its: 1) assessment of intent; 2) findings regarding individual responsibility; 3) findings on his role regarding the crime of genocide; 4) findings on common criminal intent; 5) findings on his personal status; 6) findings regarding his alibi defense; and 7) appraisal of the Prosecution's evidence. With respect to sentencing, both Kayishema and Ruzindana alleged that the Trial Chamber erred in its assessment of the aggravating and mitigating circumstances in their case. Because several issues and grounds of appeal overlap, the Appeals Chamber grouped together some grounds of appeal and addressed others separately. Similarly, this summary will discuss the general issues decided by

the Appeals Chamber rather than addressing each ground of appeal separately.²

Fair Trial Issues

The Appeals Chamber rejected all arguments presented by Kayishema in ground one and Ruzindana in ground eight of their respective appeals that they were denied a fair trial. Kayishema alleged his trial was unfair for various reasons, including that: 1) the Tribunal was under the political influence of the United Nations and the government of Rwanda and, therefore, lacked independence; and 2) the Trial Chamber violated the principle of "equality of arms" by failing to, *inter alia*, guarantee the parties equality of means and resources. Noting that the Tribunal is a judicial organ independent of other UN organs and that Kayishema failed to articulate any particular pressure allegedly exerted by Rwanda on the Tribunal, the Appeals Chamber rejected Kayishema's first argument. The Chamber also rejected Kayishema's argument that the principle of "equality of arms" had been compromised. Citing the standard adopted by the ICTY Appeals Chamber in the *Tadić* case, the Chamber noted that the rule providing the parties with equal opportunity to present their cases does not compel an equality of resources.³

Ruzindana claimed he was denied a fair trial because, as a result of the lack of specificity in the indictment, he was not promptly informed of the nature of the charges against him or allowed adequate time and resources to prepare his defense. The Appeals Chamber rejected his claim because he had neither raised this issue at trial nor alleged special circumstances that would have permitted the Chamber to consider the issue on appeal.

Defense of Alibi

Both Kayishema and Ruzindana raised several arguments relating to their alibi defenses, including that the Trial Chamber erred by shifting the burden of proof to the accused and incorrectly assessing the evidence submitted in support of their alibi defenses. The Appeals Chamber rejected Kayishema's claim that the Trial Chamber shifted the burden of proof to the defense. Relying on the *Foca* and *Čelebići* cases, the Chamber affirmed that it is the duty of the Prosecution to prove the guilt of the accused beyond reasonable doubt, even when an alibi defense is raised. In other words, while the accused must provide the Prosecution with notice and the evidence upon which he will rely to establish his alibi, the Prosecution retains the burden of establishing the truth of the facts in the indictment. The accused must merely produce sufficient evidence to raise reasonable doubt regarding the Prosecution's case. The Appeals Chamber found that Kayishema failed to provide sufficient evidence to raise such doubt.

In his sixth ground of appeal, Ruzindana asserted that the Trial Chamber erred by failing to consider the evidence relating to his alibi defense in a comprehensive manner. The Appeals Chamber noted that it was bound to respect the Trial Chamber's approach as long as it was reasonable. The Appeals Chamber stated that the Trial Chamber had not only considered individual witness statements, but also conducted an overall assessment of the evidence in order to verify the credibility of the witnesses and to evaluate whether the evidence raised doubt regarding the accused's presence at the site of the alleged massacres. Noting that such an approach was reasonable, the Appeals Chamber dismissed Ruzindana's claim.

Genocide

In his sixth ground of appeal, Kayishema alleged errors in the Trial Chamber's findings on the evidence offered to prove the crime of genocide, in addition to the manner in which the Trial Chamber applied the law to the facts when assessing Kayishema's individual circumstances. The Appeals Chamber

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confirmed that the Trial Chamber has broad discretion with respect to its analysis of evidence for fact-finding purposes. Noting that a successful challenge must show that the Trial Chamber's analysis was unreasonable, the Appeals Chamber concluded that Kayishema failed to meet this burden and, thus, rejected his challenge on this matter. In particular, the Appeals Chamber rejected Kayishema's claim that he lacked the requisite *mens rea* for the crime of genocide because he had ordered 72 children who survived the massacre to be taken to a hospital. The Chamber noted that in light of all the evidence presented, this fact had little bearing on whether Kayishema possessed the requisite *mens rea*.

On the mixed factual and legal ground of appeal relating to the interpretation of the word "*meurtre*," the Appeals Chamber affirmed the Trial Chamber's conclusion that there is "virtually" no difference between "*meurtre*" and "killing" within the context of genocide. The Appeals Chamber concluded that even if there were a difference between the two terms, both refer to intentional but not necessarily premeditated murder and that, in any event, such interpretation would not improve Kayishema's case.

Ruzindana's first ground of appeal asserted that the Trial Chamber erred in its findings on *mens rea*. Specifically, he asserted there was no proof that he had the requisite specific intent to commit the crime of genocide. The Appeals Chamber concurred with the Trial Chamber's conclusions that while explicit manifestations of criminal intent are often rare, intent may be demonstrated by persistent patterns of conduct and inferred from an individual's utterances and actions. Therefore, the Trial Chamber appropriately considered this kind of evidence in arriving at the conclusion that Ruzindana possessed the requisite intent. Noting the distinction between motive and intent, the Appeals Chamber also rejected Ruzindana's claim that his personal motives for acting the way he did precluded the presence of the requisite *mens rea* for genocide. Finally, the Appeals Chamber accepted Ruzindana's argument that the Trial Chamber failed to define the phrase "persistent pattern of conduct." However, it noted that because such a pattern is not an element of the crime of genocide, the Trial Chamber was not obliged to define it.

The Chamber also rejected Ruzindana's third ground of appeal, in which he claimed that a nexus was required between the manner in which genocide was carried out and the personal circumstances of an accused. Specifically, Ruzindana claimed genocide requires proof that the accused had the means or resources necessary to prepare for and commit genocide. The Chamber held that proof of such a nexus is unnecessary under the law.

Individual Responsibility

In his second ground of appeal, Ruzindana argued that the Trial Chamber erred in finding him individually responsible for *committing* killings because the Prosecution failed to establish a resulting death. Citing the *Tadić* case, the Appeals Chamber noted that the test for direct commission under Article 6(1) of the ICTR Statute is whether the individual directly participated in the crime and had the requisite knowledge. The Chamber concluded that establishing individual responsibility does not require a showing that the individual's actions resulted in death. However, where there is a question regarding the material fact of whether a death resulted, it is appropriately determined by the Trial Chamber in its assessment of the evidence. The Appeals Chamber noted that the Trial Chamber had found Ruzindana responsible for at least one death, that of victim Beatrice. Additionally, the Appeals Chamber noted that individual responsibility under Article 6(1) of the ICTR Statute attaches not only to direct physical

participation, but also to acts of participation that contribute to, or have an effect on, the commission of the crime. The Appeals Chamber recalled that Ruzindana was also found individually responsible under Article 6(1) for instigating, ordering, committing and otherwise aiding and abetting in the preparation and execution of a massacre with genocidal intent. As proof of resulting death is not a necessary element in the determination of individual responsibility under Article 6(1), the Appeals Chamber dismissed this claim.⁴

Although Ruzindana's fourth ground of appeal was not clear, the Appeals Chamber interpreted his claim to be that the Trial Chamber erred in its definition of criminal responsibility on the basis of participation in a common purpose or design and in its application of this definition to his case. Citing the *Tadić* case, the Appeals Chamber noted that this mode of participation in one of the crimes under the ICTR Statute does not require that the plan or purpose be previously arranged or formulated. Therefore, while meeting physically or by telephone may be a relevant factor to be considered, those acts are not constitutive of the *actus reus* element required for individual responsibility to attach pursuant to the common purpose doctrine. Thus, this claim was dismissed.⁵

In his third ground of appeal, Kayishema challenged the Trial Chamber's findings regarding his individual criminal responsibility for genocide. In particular, he challenged the Chamber's findings regarding his intent and actual participation in the crime. The Appeals Chamber noted that intent may be inferred from an individual's participation in a crime, particularly from his aiding and abetting behavior. The Appeals Chamber affirmed the Trial Chamber's finding that Kayishema had the requisite criminal intent because the combination of his authority and passive presence at crime sites amounted to tacit encouragement. Additionally, the Appeals Chamber dismissed Kayishema's claim that the Trial Chamber erred in finding actual participation, noting that the Appellant had failed to show that any of the Trial Chambers findings were so unreasonable as to result in a miscarriage of justice.

In his second ground of appeal, Kayishema challenged the Trial Chamber's finding of criminal command responsibility under Article 6(3) of the ICTR Statute. He suggested that the Trial Chamber erroneously concluded that as *préfet*, he had *de jure* authority over the assailants present during the massacres in question. Further, he claimed that as he had no *de jure* authority, he could not in fact exercise any authority over those individuals, such as preventing or punishing the crimes in question. Citing the *Celebić* case, the Appeals Chamber noted that the appropriate test, whether in the context of *de jure* or *de facto* authority, was whether the superior had effective control over the persons committing the alleged crimes. The Appeals Chamber found that Kayishema failed to show that the Trial Chamber's findings regarding his effective control were so unreasonable as to result in a miscarriage of justice.

Additional Fact-Finding Issues

In their appeal, the Appellants challenged the Trial Chamber's evaluation of witness credibility and other evidence. The Appeals Chamber reaffirmed that the Trial Chamber retains broad discretion with respect to determining witness credibility and overall assessment of the evidence.

In his claim that the Trial Chamber made factual errors with respect to its genocide analysis, for instance, Kayishema argued that testimony regarding injuries sustained by a witness should have been corroborated. The Appeals Chamber rejected the argument, stating that under *Tadić*, corroboration was not necessary. In his third ground of appeal,

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The exclusion of international law, human rights standards, and UN resolutions from past Israeli-Palestinian negotiations has been extremely detrimental to Palestinian refugees and has contributed to the breakdown of the political process. BADIL asserts that the Expert Forum will bring together legal and academic experts, politicians, and practitioners of refugee and general human rights law to pave the way toward treaty-based human rights solutions to the Palestinian refugee issue in accordance with UN Resolution 194. The first international seminar, "The Role of International Law in Peacemaking and Crafting Durable Solutions for Palestinian Refugees," will be hosted by the University of Ghent in Ghent, Belgium from May 22-23, 2003. Additional seminars will follow in Europe and Cairo, focusing on property restitution, international and regional protection mechanisms, and obstacles to the implementation of refugee return and restitution.

In March, BADIL will publish, in Hebrew, an information packet on the Right of Return. The packet will be based on BADIL's Arabic and English language information packets pub-

lished on the same topic in 2000. BADIL's Hebrew packet was created in order to answer the questions and concerns raised in the Israeli debate about Palestinian refugees' right to return to their homes and properties now located in Israel. The Hebrew language packet will serve as a tool for exploring the potential of a rational, rights-based dialogue with Israeli peace and human rights activists, educators, academic researchers and journalists. The packet will include facts and figures, responses to frequently asked questions, and international legal briefs and testimonials from Palestinian refugees regarding their vision for a just and durable solution to their plight. For more information about BADIL, please e-mail info@badil.org, or visit its Web site at www.badil.org.

The Human Rights Brief is accepting submissions for the next edition of "Brief Community News," which will be published in September. If your organization has an event or situation it would like to publicize, please send a short description to hrbrief@wcl.american.edu, and include "Brief Community News" in the subject heading of the message. Please limit your submission to two paragraphs. The Human Rights Brief reserves the right to edit for content and space limitations.

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Kayishema also challenged the Trial Chamber's assessment of the credibility of the witness who identified him. The Appeals Chamber dismissed the argument, holding that it is within the Trial Chamber's discretion to assess the probative value of testimony, including how to resolve apparent contradictions.

Similarly, in ground seven of his appeal, Ruzindana suggested that the Trial Chamber erred in not using established criteria to analyze the credibility of Prosecution witnesses; in particular, he claimed that accepting the testimony of one witness on a particular matter was unreasonable and unreliable. In its rejection of Ruzindana's claim, the Appeals Chamber noted that it is impossible to draw up an exhaustive list of criteria for the assessment of evidence, given that the circumstances of each case are different and that a judge must rule on each case in an impartial and independent manner. Dismissing Ruzindana's specific claim, the Chamber reasoned that accepting the uncorroborated testimony of a witness does not necessarily constitute error.

Sentencing

Kayishema's ground eight and Ruzindana's ground nine challenged the Trial Chamber's analysis of aggravating and mitigating circumstances in general, and with respect to their particular circumstances. As a general point, the Appeals Chamber noted that the Trial Chamber has broad discretion in weighing mitigating and aggravating circumstances at sentencing. Additionally, the Appeals Chamber stated that, pursuant to Articles 6(4) and 23 of the ICTR Statute and Rule 101, the Appellant must prove that the Trial Chamber acted beyond its discretion in sentencing the accused.

The Appeals Chamber rejected Ruzindana's claim that by taking into account the heinous means by which he committed the killings, the Trial Chamber confused a material element of the crime with an aggravating circumstance. The Appeals Chamber reasoned that the fact that an act of killing supported a conviction of genocide does not prevent a separate finding that the manner in which it was carried out gave rise to an aggravating factor. It also concluded that there was no abuse of discretion in the way the Trial Chamber weighed the aggravating against the mitigating circumstances in his case.

The Appeals Chamber also rejected Kayishema's claim that the Trial Chamber punished him twice by identifying his position of authority as an essential element in the crime of genocide and an aggravating factor. The Chamber explained

that although a mere finding of command authority cannot be considered an aggravating circumstance, the manner in which an accused exercises that authority can be an aggravating circumstance. In addition, the Chamber found that the zeal shown by the accused in committing the crimes and the harm suffered by the victims were properly characterized as aggravating factors. Finally, the Appeals Chamber stated that even if the Trial Chamber had erred in finding that Kayishema's denial of guilt and assertion of an alibi constituted aggravating factors, such error did not invalidate the sentence imposed since the primary aggravating factor was the gravity of the offense.

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ENDNOTES

¹ Musema withdrew his third ground of appeal.

² The Appeals Chamber did not address the merits of the Prosecution's appeal, finding the appeal inadmissible because of the Prosecution's failure to file its appellate brief on time and to demonstrate good cause for filing out of time. In his dissenting opinion, Judge Shahabuddeen concluded that the Prosecution had filed its appellate brief on time and that even if it had not, the Appeals Chamber could have granted the Prosecution an extension of its own accord, as, in his opinion, the Prosecution had demonstrated good cause for an extension of time to file.

³ Kayishema raised three additional arguments supporting his unfair trial claim, namely that: 1) the expression "persons responsible for" in Security Council Resolution 955 and procedural improprieties in the case compromised his right to the presumption of innocence; 2) the court failed to adhere to the adversarial principle; and 3) the Prosecution failed to timely disclose evidence. The Appeals Chamber dismissed all three arguments, finding the first two allegations meritless and rejecting the third claim because it had not been raised at trial.

⁴ In support of his argument regarding the insufficiency of evidence provided by the Prosecution on the specific intent requirement of genocide, Ruzindana also challenged the Trial Chamber's findings regarding his authority during the events in question, claiming the Prosecution had not established that he had either *de jure* or *de facto* authority. Noting that neither is required for a finding of individual criminal responsibility under Article 6(1) of the ICTR Statute, the Appeals Chamber rejected this argument as well.

⁵ Ruzindana's fifth ground of appeal asserted that the Trial Chamber made errors of fact with respect to its analysis of his personal status. This ground failed because Ruzindana failed to put forward an argument in support of his claim.