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Updates from the International and Internationalized Criminal Courts

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UPDATES FROM INTERNATIONAL AND INTERNATIONALIZED CRIMINAL COURTS & TRIBUNALS

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

VICTIMS CRITIQUE THE ICTR

In the fourteen years since the International Criminal Tribunal for Rwanda (ICTR) was established, it has made a number of decisions that have angered survivors of the Rwandan genocide. As may be expected, many of these disappointments have been the direct result of acquittal judgments handed down in genocide cases.

This fragile relationship has become more strained in recent months due to the ICTR Appeals Chamber's shocking move to acquit Protais Zigiranyirazo on November 16, 2009 (see judgment summary below). Zigiranyirazo, the brother-in-law of the late Rwandan president Juvénal Habyarimana, was originally charged with participating in a joint criminal enterprise to kill Tutsis at Kesho Hill, as well as aiding and abetting genocide in relation to the killing of Tutsis at a roadblock in Kiyovu. In 2008, Trial Chamber III found Zigiranyirazo guilty and sentenced him to twenty years of imprisonment on one count and fifteen on the other count. In its recent decision, the Appeals Chamber reversed the Trial Chamber's judgment after finding factual and legal errors in the lower chamber's assessment of Zigiranyirazo's alibi. According to the Appeals Chamber, the prosecution was unable to show beyond a reasonable doubt that Zigiranyirazo was involved in the alleged killings and the Trial Chamber erred by shifting the burden of proof to the accused.

The unexpected move was followed by another on November 17, 2009, when the ICTR decided to acquit Father Hormisdas Nsengimana. Nsengimana, a Catholic priest who was arrested in 2002 was originally thought to have been at the center of a group of Hutu extremists that carried out attacks in Nyanza in 1994. He has been accused of both direct and indirect killings, and among his alleged victims are a Tutsi priest and a judge. After a thorough examination of all the charges brought against Nsengimana, Trial Chamber I found there

was insufficient evidence to indict him and ordered his immediate release.

As expected, the two acquittals have angered many in the survivor community, sparking protests from individuals as well as survivor organizations. The protestors, who gathered in front of the ICTR documentation center three days after Nsengimana's release, criticized the ICTR and called the acquittals "malpractices." Others, such as Jean de Dieu Mucyo, the Executive Secretary of the National Commission for the Fight against Genocide (CNLG), have attributed the acquittals to the laxity of ICTR prosecutors. The CNLG and other similar organizations are of great value to the ICTR because they provide survivor witnesses to assist the prosecution. However, the recent judgments have caused many such groups to threaten to discontinue providing such services, which would significantly hinder the prosecution.

With pressure from survivor groups mounting, the ICTR is now in a delicate position. The decisions it makes in the coming months may have the power to considerably alter the ICTR's future.

Shahroo Yazdani, a J.D. candidate at the Washington College of Law, wrote this column on the International Criminal Tribunal for Rwanda for the Human Rights Brief.

PROTAIS ZIGIRANYIRAZO V. THE PROSECUTOR, CASE NO. ICTR-01-73-A

On November 16, 2009, the Appeals Chamber of the ICTR reversed the convictions of Protais Zigiranyirazo for committing genocide and extermination as a crime against humanity in relation to events occurring at Kesho Hill in Gisenyi Prefecture, as well as his conviction for aiding and abetting genocide in relation to events occurring at the Kiyovu Roadblock. The judgment marks the first time that the Appeals Chamber has entirely acquitted and released an ICTR convict.

Prior to the events of 1994, Mr. Zigiranyirazo spent twenty years in Rwandan politics, serving as a Member of Par-

liament and as prefect of two different regions. He traveled to Canada to study in 1989 and returned to Rwanda in 1993 to work in business. "Mr. Zed," as he became known, remained influential in Rwandan politics vis-à-vis the marriage of his sister, Agathe Kanzig, to President Habyarimana, whose apparent assassination was the immediate catalyst for the mass killing of Tutsis and moderate Hutus between April and July 1994. Zigiranyirazo's December 2008 convictions by the ICTR Trial Chamber stemmed from three incidents in two separate locations, which resulted in the deaths of between 810 and 1,520 persons. First, the Trial Chamber found that he traveled to a Tutsi refugee gathering on Kesho Hill, where he gave a speech to a group of officials, civilians, and *Interahamwe* soldiers just prior to the killing of between 800 and 1,500 of the refugees. Zigiranyirazo's involvement at Kesho Hill resulted in convictions on separate counts of genocide and extermination as a crime against humanity, earning him two concurrent twenty-year sentences. The prosecution also presented evidence at trial that Zigiranyirazo twice traveled to a roadblock at Kiyovu, near Kigali, where he aided and abetted acts of genocide by offering firearms and providing instructions to soldiers there. Between ten and twenty people were killed at the roadblock. The Trial Chamber convicted him on one count of aiding and abetting genocide and handed down a third concurrent sentence of fifteen years. In relation to both incidents, the Trial Chamber dismissed the alibi evidence raised by the accused.

On appeal, Zigiranyirazo challenged, *inter alia*, the Trial Chamber's evaluation of alibi evidence presented by the Defense in relation to both the events at Kesho Hill and the Kiyovu Roadblock. In addressing this challenge, the Appeals Chamber began with a general discussion of the burden of proof in the assessment of alibis. Specifically, the Appeals Chamber explained that an accused does not bear the burden of proving an alibi beyond a reasonable doubt, but must simply produce evidence that he was not present at the time of the alleged crime; or, alternatively, he must

present evidence likely to raise a reasonable doubt as to whether he was present. In the words of the Appeals Chamber, “[i]f the alibi is reasonably possibly true, it must be accepted,” and the Prosecution must then establish beyond reasonable doubt that, “despite the alibi, the facts alleged are nevertheless true.” In order to determine whether the Trial Chamber improperly shifted the burden in a given case, the Appeals Chamber held that it must look for language suggesting, *inter alia*, that the Trial Chamber required the accused to “negate” the prosecution’s argument, to “exonerate” himself, or to “refute the possibility” that he could have been present when the crime was committed.

The Appeals Chamber then turned to the alleged errors relating to the Defense’s alibi evidence in regards to Kesho Hill. As stated above, the Trial Chamber found that Zigiranyirazo was present at Kesho Hill at some time during the morning of April 8, 1994 and that he addressed a group of assailants just before the group launched an attack on Tutsis taking refuge at the site. At trial, the Defense presented testimony from nine witnesses who placed Zigiranyirazo at the presidential residence at Camp Kanombe just outside Kigali at various times throughout the day of April 8, 1994. The Defense also entered evidence regarding the distance between Kanombe and Kesho Hill to establish that it would have been impossible for Zigiranyirazo to be in both places within the relevant time frame at issue. In reviewing the Defense’s alibi evidence and the Trial Chamber’s treatment of that evidence, the Appeals Chamber found three errors. First, although the Trial Chamber correctly stated in its judgment that the Prosecution bore the burden of proof, the Appeals Chamber found that the lower court’s approach to the alibi evidence “indicate[d] that it placed a greater evidentiary burden on Zigiranyirazo to establish an alibi than required” For instance, the Trial Chamber stated that the alibi evidence was “inconclusive,” that it “[did] not contradict [Prosecution evidence],” and that it “[did] not provide . . . an alibi.” In the Appeals Chamber’s opinion, these comments established that the Trial Chamber “did not fully appreciate that Zigiranyirazo only needed to establish reasonable doubt that he would have been able to travel to and from Kesho Hill on the morning of 8 April 1994, rather than establish his exact location throughout the day in Kanombe.”

Second, the Appeals Chamber found that the lower court erred in failing to provide a “reasoned opinion” in relation to the feasibility of travel between Kesho Hill and Kanombe, which was an issue of “crucial importance.” Finally, the Appeals Chamber determined that the Trial Chamber committed error by improperly dismissing certain key alibi evidence offered by the Defense. Taken together, the Appeals Chamber found that the lower court’s reversal of the burden of proof, failure to provide a reasoned opinion on an issue critical to the Defense’s case, and mistreatment of key evidence invalidated Zigiranyirazo’s convictions in relation to the events at Kesho Hill.

Turning to Zigiranyirazo’s conviction for the events at the Kiyovu Roadblock, the Appeals Chamber found that the Trial Chamber committed the same three errors that it had committed in relation to the Kesho Hill convictions. First, the Appeals Chamber again found evidence that the lower court had shifted the burden of proof, citing language from the Trial Chamber’s judgment suggesting that Zigiranyirazo was required to “exclude the possibility” of his responsibility for the crime, rather than merely cast a reasonable doubt on the Prosecutor’s case. Second, the Appeals Chamber found that the Trial Chamber failed to consider, or at least failed to provide a reasoned opinion regarding, travel times between the roadblock and Rubaya, where Zigiranyirazo spent his nights during the relevant period of time. Lastly, the Trial Chamber failed to consider “the evidence as a whole as well as the relevant circumstantial evidence” when evaluating the Defense’s alibi evidence, leading the Appeals Chamber to conclude that the lower court had misconstrued key facts in the case. Again, the Appeals Chamber found that, taken together, these errors invalidated Zigiranyirazo’s conviction.

Given the reversals of Zigiranyirazo’s three convictions, the Appeals Chamber did not address the Defense’s fifteen other grounds for appeal or the Prosecutor’s appeal for an extended sentence. Notably, while the Appeals Chamber has authority to remand any issue to the Trial Chamber, the present judgment in no way indicates that the Appeals Chamber considered remand appropriate in this case. Upon the pronouncement of the Appeals Chamber’s judgment, Zigiranyirazo was released from the UN detention center in Tanzania, where

he had been held since shortly after his arrest in Belgium in 2001.

Christopher Valvardi, a J.D. candidate at the Washington College of Law, wrote the judgment summary of Protais Zigiranyirazo v. The Prosecutor. Susana SáCouto, Director of the War Crimes Research Office, and Katherine Anne Cleary, Assistant Director of the War Crimes Research Office, edited this summary for the Human Rights Brief.

THE PROSECUTOR V. THARCISSE RENZAHU, CASE NO. ICTR-97-31-A

On July 14, 2009, Trial Chamber I of the ICTR found Tharcisse Renzaho guilty of genocide, murder as a crime against humanity, rape as a crime against humanity, murder as a violation of Common Article 3 to the Geneva Conventions, and rape as a violation of Common Article 3 to the Geneva Conventions. Renzaho was sentenced to life imprisonment.

During the genocide in Rwanda in 1994, Tharcisse Renzaho was both the prefect of Kigali-Ville prefecture and a colonel in the Rwandan army. As prefect, Renzaho was responsible for “peace and security in Kigali-Ville.” Furthermore, following the death of Rwandan President Habyarimana on April 7, 1994, Renzaho was appointed to a “crisis committee” established by the senior military command of the army. Renzaho left Rwanda in early July 1994 and was arrested in September 2002 in the Democratic Republic of Congo.

At trial, the Prosecution put forward evidence of a wide array of activities it believed supported its charges against Renzaho, although the Trial Chamber dismissed several of the allegations. For instance, the Prosecution alleged that, because Renzaho recruited and trained the *Interahamwe* militia between mid-1993 and July 1994, the accused bore responsibility for the killings and serious bodily and mental harm caused by the *Interahamwe* between April 6 and July 17, 1994. However, while the Trial Chamber found evidence to support the claim that Renzaho encouraged certain students to join the *Interahamwe* and permitted the group to meet at his house for the purpose of receiving military training, the Chamber observed that support to a “youth organization” did not “in itself” constitute a crime within the Tribunal’s jurisdiction. It further noted that no evidence suggested that Renzaho “made state-

ments against the Tutsis” in this context or that the “purpose of the training was to kill Tutsis.” In addition, the Trial Chamber found insufficient evidence to support the Prosecution’s claims that Renzaho ordered the killing of certain Tutsis living in Kigali, such as André Kameya, a journalist critical of the Interim Government.

Nevertheless, the Trial Chamber found that evidence did support several others of the Prosecution’s allegations. For instance, the Trial Chamber found that Renzaho was responsible for the events occurring at a number of roadblocks that were used to identify Tutsis who were then captured or killed. Specifically, although it discredited evidence that Renzaho personally manned the roadblocks, the Trial Chamber found that the accused “ordered the establishment of and support to” the roadblocks, based primarily on evidence of his statements at public meetings and over the radio. Notably, while the evidence did not establish that the accused provided “explicit orders” to kill Tutsis at the roadblocks, it was clear to the Trial Chamber that Renzaho was aware that people were being killed at roadblocks “based on their ethnicity and political leanings” as early as April 10, 1994. Thus, it concluded that the accused “was aware that the continued killing of Tutsi civilians was a likely outcome” of his orders to erect additional roadblocks. The Trial Chamber also found that Renzaho was involved in the killing of a number of Tutsis who had sought refuge in Kigali’s Centre des Etudes de Langues Africaines (CELA). In particular, the Chamber found that, on April 22, 1994, Renzaho supervised a “selection process” by which *Interahamwe* separated about forty Tutsis from the other refugees. Renzaho then sent the remaining refugees home, while the forty persons selected by the *Interahamwe* were killed. Similarly, the Chamber found that Renzaho bore responsibility for the killing of some forty to fifty Tutsis who had taken refuge in the Saint Famille Church, as the evidence established that Renzaho had been present at the church prior to the attack, had directed the *Interahamwe* to kill “many persons,” and later ordered them to stop the attack upon the approach of UN troops.

In addition to finding Renzaho responsible for genocide based on his involvement in killings of Tutsis, the Trial Chamber found that Renzaho’s role in several instances of sexual violence against

Tutsi women supported the Prosecution’s charges of genocide, noting that genocide may be carried out by acts intended to cause serious bodily or mental harm if those acts are performed with the requisite genocidal intent. The Court found genocidal intent behind the rapes charged in this case because of the surrounding circumstances, including the targeting of Tutsis and Renzaho’s comments encouraging the rapes. For example, witnesses testified that Renzaho encouraged the rapes by saying Tutsi women were “food for the militiamen,” and telling his subordinates that it was “time to show Tutsi women that Hutus are strong and can do whatever they wanted to do with them.”

In terms of Renzaho’s individual criminal responsibility, the Chamber determined that he bore responsibility for each of the crimes relating to events at the roadblocks, CELA, and Saint Famille Church under a theory of direct responsibility for ordering and aiding and abetting the crimes, as well as under a theory of superior responsibility, as Renzaho knew or should have known that people over whom he exercised authority were going to commit the relevant crimes, but he did nothing to prevent the crimes. In relation to the crimes of sexual violence, the Chamber determined that Renzaho was responsible under a theory of superior responsibility only. Interestingly, the Defense had argued that the *Interahamwe* were so unorganized and undisciplined that it would have been impossible for Renzaho to effectively control them. However, the Chamber rejected this claim, finding that Renzaho was indeed in a superior-subordinate relationship with those who committed the crimes, not only by virtue of his military rank, but also due to his role as prefect of Kigali-Ville.

For sentencing purposes, the Prosecution submitted several aggravating factors for the Chamber’s consideration, including Renzaho’s breach of his duty to the population, which derived from his position as prefect, and the duration and severity of his crimes. The Defense proposed that the Chamber consider Renzaho’s long history of public service, as well as evidence that he sheltered Tutsis in his house and tried to arrest wrongdoers, as mitigating circumstances. In weighing these factors, the Chamber gave significant weight to Renzaho’s position as a civilian and military superior, holding that these increased the gravity of his crimes. Furthermore, while it

recognized Renzaho’s background in public service and his submissions concerning assistance to Tutsis, it afforded these factors “very limited weight” in light of the severity of his crimes. In determining that a life sentence was appropriate, the Chamber explained that the sentence was a single, global sentence encompassing punishment for each of Renzaho’s crimes, which was appropriate in the view of the Chamber because all of the offenses were a part of “a single criminal transaction.”

Aileen Thomson, a J.D. candidate at the Washington College of Law, wrote the judgment summary of The Prosecutor v. Tharcisse Renzaho. Susana SáCouto, Director of the War Crimes Research Office, and Katherine Anne Cleary, Assistant Director of the War Crimes Research Office, edited this summary for the Human Rights Brief.

SPECIAL COURT FOR SIERRA LEONE

CROSS EXAMINATION OF CHARLES TAYLOR

The Special Court of Sierra Leone (SCSL) resumed with the cross examination of Charles Taylor, the former Liberian President, on January 11, 2010. Taylor is currently charged with eleven counts of war crimes and crimes against humanity. He has denied allegations that he supplied arms and ammunition to rebels in return for Sierra Leone blood diamonds and helping Revolutionary United Front (RUF) rebels plan operations in which they committed rape, murder, and amputations.

In early 2010, Brenda Hollis, Lead Prosecutor for the SCSL, questioned Taylor about allegations made by actress Mia Farrow pertaining to a 1997 party in South Africa, which was hosted by Nelson Mandela and attended by Naomi Campbell, Mia Farrow, and other celebrities. The allegations claim Taylor delivered a diamond to Naomi Campbell that he had received from the Sierra Leone junta regime. The Prosecutor argued the inclusion of these allegations would refute Taylor’s claims that he never received diamonds when he was in the Nation Patriotic Front (NPFL) or President of Liberia. The use of a document with these allegations reignited the ongoing battle over the use of fresh evidence during cross examination. The Judges disallowed the Prosecution from using the document in cross examination.

In addition, the Prosecution used Taylor's four-month-long direct examination testimony to challenge Taylor on topics outside the indictment timeframe, in order to test Taylor's credibility as a witness. Taylor was asked about his involvement in the 1985 coup to overthrow the then-Liberian president, Samuel Doe; alleged money embezzlement; and the reason for his stepping down as Liberian president. During examination, Taylor said the 2003 attack by Liberian rebels on an annex of the U.S. Embassy in Monrovia was what made him decide to step down as president. The Prosecution drew attention to the fact the attack occurred one month after the Accra peace talks, during which Taylor had indicated his willingness to step down as president. The Prosecution also alleged that in 1999, when the RUF rebels entered into negotiations with the government of Sierra Leone, Taylor advised his negotiations team to ensure that the peace agreement would benefit RUF rebels. However, Taylor denied the allegations.

In the second week of cross examination, Taylor denied several more of the Prosecution's allegations, including that Taylor knew about RUF Commander Sam Bockarie's threat in December 1998 to attack Freetown. The threat was carried out in January 1999. The rebels committed murders and rapes, burned houses, and amputated the limbs of civilians. The Prosecution dismissed Taylor's denial, arguing that as the point person for peace in Sierra Leone, he would have been aware of such threats. The Prosecution further alleged that Taylor was superior to RUF leaders, and he knew or had reason to know that the rebels were committing such atrocities. One of Taylor's central defenses during his trial has been his stated role as peacemaker during the Sierra Leone war. Taylor maintains that in 1997 when he became Liberian president, the Economic Community of West African States made him head peacemaker for the conflict in Sierra Leone, and that he did not know about RUF leader Sam Bockarie's threats of attack.

As the Prosecution continues its cross-examination of Charles Taylor, it will begin stepping away from demonstrating Taylor's untruthfulness during his testimony and begin focusing on specific allegations such as the use of child soldiers, physical and sexual violence, and other acts of terrorism directed at civilians.

Laticia Sanchez, a J.D. candidate at the Washington College of Law, wrote this column on the Special Court for Sierra Leone for the Human Rights Brief.

PROSECUTOR V. SESAY, KALLON, AND GBao, CASE NO. SCSL-04-15-A

On October 26, 2009, the Appeals Chamber for the Special Court for Sierra Leone upheld the convictions of three former RUF leaders for crimes against humanity, violations of Common Article 3 to the Geneva Conventions and of Additional Protocol II, and other serious violations of international humanitarian law. The charges it upheld included those relating to forced marriage, the conscription and use of child soldiers in armed conflict, and attacks on UN peacekeepers. It reaffirmed sentences for Issa Sesay, Morris Kallon, and Augustine Gbao of 52 years, 40 years, and 25 years, respectively. The Chamber dismissed 96 counts of appeal, noting that many of the Appellants' grounds for appeal were vague, unsupported, and undeveloped. While the Appeals Chamber did grant one of Gbao's grounds of appeal, overturning his conviction for collective punishments as a war crime, the acquittal on this single count did not alter Gbao's overall sentence. Similarly, although the Appeals Chamber granted two of the Appellants' claims of error in regards to sentencing, the findings of error did not require that the sentences handed down by the Trial Chamber be decreased.

Among the unsuccessful grounds of appeal brought by the RUF leaders was a claim that the Trial Chamber had erred in finding that Kallon acted with the requisite intent in relation to the crime of conscripting and using children under the age of 15 to participate actively in hostilities. Specifically, Kallon alleged that the Trial Chamber had improperly shifted the burden of proof to the defense by holding that "where doubt existed as to whether a person abducted or trained was under the age of [15], it was incumbent upon the perpetrator to ascertain the person's age." In response, the Appeals Chamber first noted its previous holding that the prohibition on conscripting or using child soldiers existed in customary international law at the time the RUF leaders allegedly engaged in such conduct and that "a significant body of conventional international law imposes an obligation on parties to 'take all

feasible measures to ensure that children are not recruited or used in hostilities.'" Accordingly, the Appeals Chamber held that military leaders "are under a duty to act with due diligence to ensure that children under the age of [15] are not recruited or used in combat," and that "[f]ailure to exercise such due diligence to ascertain the age of recruits does not relieve an accused of his liability for their recruitment or use." Based on these findings, the Appeals Chamber rejected Kallon's appeal. In a separate concurring opinion, Judge Renate Winter clarified that, in her view, the Chamber's holding on this issue applied the *mens rea* applicable to the age of child soldiers codified in the Elements of Crimes of the International Criminal Court (ICC), which requires that the perpetrator "knew or should have known" that the children were under 15 years old. While the ICC's Elements of Crimes are in no way binding on the Special Court, Judge Winter nevertheless stressed that the standard applied by the Special Court was equivalent to the ICC standard.

Another challenge brought by Kallon was that the Trial Chamber had erred in convicting him of the war crime of intentionally directing attacks against peacekeepers. Noting that one of the elements of the crime is that the relevant "personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict," Kallon argued that the UN peacekeeping force in Sierra Leone, UNAMSIL, had "acted in a belligerent manner" toward the RUF, thus "stripping itself of any international protection accorded [to] civilians or peacekeepers." However, the Appeals Chamber agreed with the Trial Chamber that it was necessary to consider the "totality of the circumstances" to determine whether peacekeepers are entitled to the protection afforded to civilians and that, in the context of the RUF attack on UNAMSIL, the circumstances showed that the peacekeepers did benefit from the protection afforded to civilians. In support of this finding, the Appeals Chamber noted that UNAMSIL was a peacekeeping mission (as opposed to a peace enforcement mission) that was authorized to use force only in certain exceptional circumstances; that the peacekeepers were only lightly armed; and that the peacekeepers did not engage in

hostilities or use force, except legitimately in self defense.

In regards to Gbao's successful ground of appeal against his conviction for the war crime of collective punishments, Gbao argued that the Trial Chamber "failed to find that he held the specific intent required for collective punishment." In its judgment, the Trial Chamber found Gbao guilty of the war crime of collective punishments based on the unlawful killing of 63 civilians, which was done in the presence of several senior RUF members, including Gbao, for the purpose of "indiscriminately punishing civilians" perceived to be collaborating with the Civil Defense Forces. Based on a review of the facts, the Appeals Chamber agreed with Gbao's submission that the Prosecution failed to establish Gbao had the specific intent to collectively punish the civilians who were killed, and thus overturned his conviction. Nevertheless, the Appeals Chamber upheld Gbao's sentence of 25 years, noting "the particular circumstances of this case as well as the form and degree of the participation of Gbao in the crimes, and the seriousness of the crimes."

Finally, with respect to sentencing, Kalon and Gbao successfully challenged their cumulative convictions on the counts of extermination as a crime against humanity and murder as a crime against humanity. The Appeals Chamber agreed that the latter crime is fully subsumed within the former and thus held that convictions on both counts for the same underlying acts are "impermissibly cumulative." Because the crime against humanity of extermination is the more specific offense, the Appeals Chamber held that the convictions for the relevant killings would stand under extermination as a crime against humanity, but not under murder as a crime against humanity. The Appeals Chamber also agreed that the Trial Chamber "erroneously double-counted" evidence of the Appellants' specific intent in relation to the war crimes of terrorism and collective punishments. Specifically, the Trial Chamber erred in considering the specific intent to terrorize or collectively punish as increasing the gravity of the underlying offenses and, therefore, warranting the imposition of higher sentences, because the relevant intent is an element of the offense in regards to each crime. Again, however,

the Appeals Chamber did not find that these errors warranted any reduction in the overall sentences determined by the Trial Chamber.

Laticia Sanchez, a J.D. candidate at the Washington College of Law, wrote the judgment summary of The Prosecutor v. Tharcisse Renzaho. Susana SáCouto, Director of the War Crimes Research Office, and Katherine Anne Cleary, Assistant Director of the War Crimes Research Office, edited this summary for the Human Rights Brief.

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FOUR FORMER KHMER ROUGE LEADERS CHARGED WITH GENOCIDE

The Extraordinary Chambers in the Courts of Cambodia (ECCC) have confirmed the inclusion of charges of genocide in the case against four former Khmer Rouge leaders currently in detention. Nuon Chea, known as "Brother Number Two," Khieu Samphan, the ex-head of state; Ieng Sary, the former foreign minister; and Ieng Thirith, the former minister of social affairs, were informed of the additional charges during meetings in December 2009. The genocide charges refer specifically to the killing of Vietnamese people and members of the Cham Muslim minority group. In early January 2010, the Co-Investigating Judges ruled that they would not bring genocide charges relating to another minority the Khmer Krom.

The four former officials are being investigated in Case 002 at the ECCC. The Co-Investigating Judges, You Bunneng and Marcel Lemonde, are expected to decide by September 2010 whether to indict the four former leaders and to settle the final charges, if any. The genocide charges have been added to earlier charges, including crimes against humanity and grave breaches of the Geneva Convention. The only other case at the tribunal, Case 001 against Kaing Guek Eav (known as "Duch") ended in November 2009; Duch was not tried for genocide.

Although the mass killings under the Khmer Rouge in Cambodia between 1975 and 1979 are often referred to as genocide, academics have long debated whether they satisfy the legal definition. The 1948 UN

Convention on the Prevention and Punishment of Genocide defines genocide as the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such." The ECCC accepted the Convention's definition of genocide for use in trials at the tribunal.

During its time in power, the Khmer Rouge systematically executed or caused the death of those they considered ideological enemies. The genocide charges in Case 002 refer to the killing of members of identified groups, which would fall under the ECCC's definition of genocide. However, there is some debate about whether the regime had a specific intent to destroy those groups or if the intent was to eliminate political opposition to the regime, which included these ethnic and religious groups. The definition adopted by the ECCC does not recognize the destruction of political groups as genocide.

In a filing to the Co-Investigating Judges, defense counsel for Ieng Sary asserted that the tribunal should use a "purpose-based" approach to determine intent in crimes of genocide rather than a "knowledge-based" approach. A knowledge-based determination of intent would only require that the perpetrators knew their actions would lead to the destruction in whole or part of a defined group, while a purpose-based intent would demand that the perpetrators have the destruction of the group as a particular goal.

The exclusion of genocide charges in relation to the Khmer Krom, ethnic Krom from the Mekong Delta region in Vietnam, could complicate an already intricate trial process. The Co-Investigating Judges ruled that the charges would not be brought for procedural reasons. According to the ruling, the facts and geographic areas cited by the Prosecutors and civil parties were not included in either the introductory or supplemental submissions by the Prosecutors, which is a requirement for expanding the investigation. The lawyers for the Khmer Krom civil parties are expected to appeal the decision.

Amanda Chace, a J.D. candidate at the Washington College of Law, wrote this column on the Extraordinary Chambers in the Courts of Cambodia for the Human Rights Brief.

INTERNATIONAL CRIMINAL COURT

ICC PROSECUTOR REQUESTS
INVESTIGATION INTO KENYAN
POST-ELECTION VIOLENCE

On November 26, 2009, the Prosecutor for the International Criminal Court (ICC) Luis Moreno-Ocampo formally requested that Pre-Trial Chamber II allow him to conduct an investigation into the post-election violence that occurred in Kenya between late 2007 and early 2008. In making the request, Moreno-Ocampo for the first time exercised his *proprio motu* powers as Prosecutor under Article 15 of the Rome Statute. Article 15 provides that the Prosecutor can open an investigation and bring cases against a State Party to the Rome Statute if he is able to prove the existence of several criteria.

Moreno-Ocampo structured his request to demonstrate that the situation in Kenya met all relevant articles of the Rome Statute. First, Moreno-Ocampo sought to establish that the ICC has jurisdiction over the events in Kenya by providing evidence that the alleged crimes fit definitions in Article 5 of the Rome Statute such as murder, rape, deportation, and other inhuman acts constitute crimes against humanity. Additionally, the events satisfy Article 11 because they occurred after the Rome Statute came into effect in Kenya on June 1, 2005, and they satisfy Article 12 because they occurred on Kenyan territory.

Second, Moreno-Ocampo argued that his request was admissible because Kenya is unwilling and unable to prosecute the matter itself as required by Article 17(1)(a)-(c). As required by these provisions, Moreno-Ocampo established that no investigations had been conducted by Kenyan officials and none were likely to be undertaken. In particular, the Kenyan Parliament defeated a motion to establish a special tribunal to investigate the violence and also refused to refer the matter to the ICC. Moreno-Ocampo argued that the events satisfied the requirements of Article 17(1)(d) because the crimes are sufficiently grave to merit ICC intervention. By the time a power-sharing agreement was reached by Mwai Kibaki and Raila Odinga in February 2008, there had been over 1,000 civilians killed, 900 documented cases of rape, and 350,000 people displaced. In one particular incident, between 17 and 35 people were burned alive inside a church. Furthermore,

Kenyan organizations, like the Kenyan National Commission on Human Rights and the Waki Commission, have compiled lists of individuals who may have directed the attacks, and these lists include political leaders on both sides of the electoral dispute.

Although the Court has not yet established what an investigation against the interests of justice would be, Moreno-Ocampo argued that the investigation would not be against the interests of justice pursuant to Article 53(1). He reasoned in his request that, to open an investigation under Article 53, the Prosecutor must positively prove jurisdiction and admissibility, but the ICC may refuse to grant leave if it decides the investigation would be against the interests of justice. Moreno-Ocampo stated that no such conflict is apparent from available evidence, so the request should be accepted.

Around the same time that Moreno-Ocampo submitted his formal request, he made a general announcement calling for victims of the violence to come forward and share their accounts with the Prosecutor. He announced that the period for victims to make statements would last until December 21, 2009. This effort was complicated by issues such as how to provide for the security of victims who come forward. As a result, Kenyans have requested to extend the deadline and to disseminate information on ICC procedures so victims would be more aware of their rights in any further proceedings.

PRE-TRIAL CHAMBER DECLINES TO
CONFIRM CHARGES AGAINST ABU
GARDA

On October 19, 2009, a confirmation hearing began in the case of *Prosecutor v. Bahar Idriss Abu Garda* before an ICC Pre-Trial Chamber. Abu Garda is the Chairman and General Coordinator of Military Operations of the United Resistance Front, a rebel group fighting the Sudanese government. He is the first accused from the Darfur situation to appear before the ICC. The hearing addressed allegations from a summons issued in May 2009 that Abu Garda commanded an attack on peacekeepers of the African Union Mission in Sudan (AMIS) at Haskanita in Northern Darfur on September 29, 2007. As a result of the attack, twelve AMIS soldiers were

killed, eight were wounded, and AMIS equipment was destroyed.

Specifically, the Prosecutor brought three charges against Abu Garda: violence against life, in the form of murder, whether committed or attempted; intentionally directing attacks against personnel, installations, materials, units, and vehicles involved in a peacekeeping mission; and pillaging. ICC Prosecutor Luis Moreno-Ocampo explained at a press conference that, while several attacks had been perpetrated against peacekeepers, charges were filed against Abu Garda for the Haskanita attack because of its far-reaching consequences. He said, “[W]ith the killings [the peacekeepers] had to withdraw [from Haskanita], leaving thousands of civilians unprotected. The attack had consequences for the delivery of humanitarian aid as well as safety and security in the region.”

The purpose of the confirmation hearing was to evaluate whether the Prosecutor had gathered sufficient evidence for the ICC to find Abu Garda guilty if the case proceeds to trial. First, opening statements were made by the Prosecutor, Defense, and four representatives of 78 identified victims who had applied. Next, the Prosecutor presented documentary evidence and elicited testimony from three witnesses. The Defense then had an opportunity to challenge the Prosecutor’s evidence and witnesses, and present its own. Defense counsel sought to establish that Abu Garda was not present in Sudan at the time of the attacks and instead was traveling elsewhere in Africa on behalf of the Justice and Equality Movement, another rebel group with which he was formerly affiliated. Additionally, the Defense argued that he did not order the attack and in fact condemned it. After both sides presented their evidence and witnesses, the victim representatives had an opportunity to challenge anything that affected their clients’ interests. Finally, the Prosecutor, Defense, and the victim representatives made closing arguments. The hearing concluded on October 30, 2009.

On February 8, 2010, the Pre-Trial Chamber entered a decision in which it declined to confirm the charges against Abu Garda. The Chamber concluded that the attack on Haskanita was sufficiently grave to merit ICC involvement because the violence caused AMIS to decrease its presence in the region and led to further

instability. However, the Chamber did not find that the Prosecutor had entered enough evidence to create “substantial grounds” on which to find Abu Garda guilty for the crimes of which he was accused. The Prosecutor now has several options for how to proceed. He can resubmit his request for confirmation of charges with additional evidence, or he can petition the Pre-Trial Chamber for leave to appeal the decision on the evidence as entered.

Paul Rinefierd, a J.D. candidate at the Washington College of Law, wrote these columns on the International Criminal Court for the Human Rights Brief.

ICC APPEALS CHAMBER REVERSES PRE-TRIAL CHAMBER II DECISION TO RELEASE JEAN-PIERRE BEMBA GOMBO

On December 2, 2009, the Appeals Chamber for the ICC reversed Pre-Trial Chamber II's August 14 decision granting Jean-Pierre Bemba Gombo interim release. The Appeals Chamber unanimously agreed that the Pre-Trial Chamber “misappreciated and disregarded relevant facts” in concluding that substantial changes in Bemba's circumstances justified conditional interim release. More importantly, the Court specified the conditions required to grant interim release. It determined that interim release must be a “single unseverable decision” that fully states the specific conditions for release. In addition, the Court required the identification of a host country willing to take responsibility for the defendant before interim release is granted.

Jean-Pierre Bemba Gombo is a Congolese national charged with war crimes and crimes against humanity for his actions as military commander in the Central African Republic in 2002 and 2003. He has been in ICC custody since 2008 and will stand trial April 2010.

Pre-Trial Chamber II determined in August 2009 that Bemba no longer fulfilled the requirements of Article 58(1) of the Rome Statute, which requires that a defendant be kept in custody prior to trial to ensure his appearance at trial. The reasons for keeping someone in custody are to prevent harm to witnesses and victims and to prevent the defendant from committing additional related crimes. Judge Ekaterina granted Bemba interim release pending a host country's willingness to take him. This decision was based on reduced charges and good behavior. However, without a willing host country Bemba's release was illusory at best. The Appeals Court's requirement that a host country be identified in order to consider interim release resolves the issue that Bemba's possible release created. The Court stressed that without state cooperation, a conditional release would be ineffective. While Bemba will not be granted release at this time, the Appeals Chamber's decision clarified the requirements needed for interim release for defendants.

SECOND CONGOLESE WARLORD TRIAL RESUMES

The ICC trial of Congolese warlords Germain Katanga and Matthieu Ngudjolo Chui resumed on January 26, 2010. Originally set to start in September 2009, the ICC decided to postpone the proceedings to allow for more investigation and was then forced to postpone the proceedings again when Judge Christine Van den Wyngaert was injured in a bicycle accident on December 2, 2009. *The Prosecutor v. Katanga and Ngudjolo* is the second trial for the ICC and is a unique case that will present many challenges for the Court. William Pace, Convenor of the Coalition for the International Criminal Court, explained that “the Court will deal with two accused, two defense teams, multiple charges, and more participating victims than in the Lubanga trial.”

Germain Katanga and Matthieu Ngudjolo Chui are jointly accused of seven war crimes and three crimes against humanity committed in the village of Bogoro in the Ituri district of the Democratic Republic of Congo (DRC) from January through March 2003. According to Human Rights Watch, Katanga and Ngudjolo purposely attacked the village with the goal of eradicating the Hema population in the area. In addition to attacking civilians, the defendants are charged with murder, rape, sexual slavery, pillaging, destruction of property, and using child soldiers.

Due to length of the proceedings and the large numbers of victims, this case is unique for the ICC and will be closely followed in the DRC. The Rome Statute of the ICC allows victims to actively participate in trial by voicing their concerns and opinions in proceedings that affect their personal interests provided they do not violate the defendants' rights to a fair trial. In the *Katanga and Ngudjolo* trial, the Court has granted victim status for 345 applicants; however, all except for a small group of child soldiers will be represented by a common legal representative. Paulina Vega, Interim Director at the International Justice Desk at the International Federation for Human Rights, praises the courts for allowing so many victims to participate in the trial, but wonders if “a single legal representative for the larger group of victims will not fail to guarantee their meaningful participation.” Allowing victims to participate in the trial hopefully satisfies victims' need for justice and closure, which are important goals for the ICC. Although the *Katanga and Ngudjolo* trial will present numerous procedural challenges, hopefully it will be fair and meet victims' expectations as well. **HRB**

Rebecca Williams, a J.D. candidate at the Washington College of Law, wrote these columns on the International Criminal Court for the Human Rights Brief.