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Updates from the International and Internationalized Criminal Courts

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Updates from the International and Internationalized Criminal Courts

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UPDATES FROM THE INTERNATIONAL AND INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

STALLING TACTICS OR DUE PROCESS? THE KARADZIC TRIAL RESUMES

On April 8, 2010, the trial of Radovan Karadzic resumed after the International Criminal Tribunal for the former Yugoslavia (ICTY) rejected Karadzic's plea stating, "The chamber is not satisfied that there has been any violation of the accused's right to a fair trial which would justify a stay of the proceedings." The trial was initially set to resume on March 1, 2010 after a five-month postponement, but was adjourned the very next day, pending a decision by the Appellate Chambers on Karadzic's appeal of a prior Trial Court decision to reject his plea for postponement. A plea of not guilty was submitted on Karadzic's behalf to the ICTY on March 3, after Karadzic failed to submit one on his own behalf. During the second week of the trial's resumption, the prosecution will start to present witness testimony for the first time.

The former Bosnian Serb leader is charged with genocide, war crimes, and crimes against humanity, committed during the 1992-95 conflict in Bosnia. Karadzic is widely regarded as the architect of some of the worst atrocities since World War II and is blamed, among other things, for the siege of Sarajevo and the attack on Srebrenica. Known as the Karadzic war, the attack on Srebrenica took the lives of over 8,000 Bosnian Muslim boys and men. The siege of Sarajevo lasted 44 months, and death toll estimates range as high as 10,000 people, with 56,000 wounded. Responding to these charges, Karadzic has claimed that the Western narrative of these events is biased, and has called the Serb role in the conflict "just and holy."

Karadzic was arrested and transferred to the ICTY in 2008, and his trial was initially set to take place in July of that year. After several postponements, the trial began in November 2009, but was again postponed after Karadzic boycotted the proceedings. In a letter to the Court, Karadzic stated that his decision to exer-

cise his right to self-representation and the subsequent difficulties that accompanied his decision should not negatively impact the fairness of his trial and his time to fully prepare. Standby counsel was appointed by the Court and afforded five months, till March 1, 2010, to prepare for the trial.

The trial has been anticipated as a means of exposing long-hidden truths, among them the inadequate response of UN peacekeepers, who had information before the Serbian attack on Srebrenica. Others have hailed the trial as a means of lifting the shroud of secrecy that has masked the systematic and brutal killing and mistreatment of Bosnian Muslims in Sarajevo. Perhaps most important, the trial should present the opportunity for the victims of these atrocities to be heard.

"Everything the Serbs did is being treated as a crime," Karadzic said during his opening statement before the court in March. Karadzic described attacks by Bosnian Muslims and stated that Bosnian Serbs' actions were a response to these attacks and only aimed at military forces. Karadzic further stated that the siege of Sarajevo was a myth "aimed at drawing NATO into the conflict on the side of Bosnian Muslims." While Karadzic claims to be preparing the truth about Srebrenica and the other allegations, victims of these events have stated that he deserves a "Nobel Prize for lying." Despite Karadzic's multiple opportunities to tell his side of the story, no witnesses reached the stand at any prior hearing. With the recommencement of the trial, the Court and the public will finally hear victims' voices. The telling of the war's stories, both those of the victims and those of Karadzic, is the chance for truths to come out, and perhaps, for some of the wounds to begin to heal.

Anna Maitland, a J.D. candidate at the American University Washington College of Law and an Articles Editor for the Human Rights Brief, wrote this column on the International Criminal Tribunal for the former Yugoslavia.

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

MUVUNYI VERDICT

On February 11, 2009, Trial Chamber III of the International Criminal Tribunal for Rwanda (ICTR) handed down a reduced sentence of fifteen years to Tharcisse Muvunyi for direct and public incitement to commit genocide. The amended judgment came from a retrial of a hearing on September 12, 2006, when Trial Chamber II sentenced Muvunyi to 25 years in prison for acts of genocide as well as public incitement to commit genocide and other inhumane acts.

From 1994 until his departure from Rwanda, Muvunyi was the commander of the School of Non-Commissioned Officers (ESO). Based in the Butare Prefecture, he was the highest placed military officer in charge of security operations for both the prefecture of Butare and Gunkogoro. While serving at this post, Muvunyi accompanied the then-interim President Théodore Sinдикubwabo to the investiture ceremony for the new regional administrator. There, Sinдикubwabo made an inflammatory speech inciting the killing of Tutsis. During Muvunyi's ICTR hearing, the prosecution argued that because Muvunyi and others did not at that point disassociate themselves from Sinдикubwabo, they sent a message of approval. Muvunyi himself then purportedly went on to incite a series of groups to kill Tutsis.

The Prosecution alleged that Muvunyi, who was in charge of ensuring the safety of civilians, did not ensure Tutsis' safety, but rather he and others "fomented, encouraged, facilitated and/or approved amongst other things, the murders, abductions and destruction of property by the Interahamwe and the military." Additionally, Muvunyi was also said to have direct involvement in the supply and transportation of arms meant for the perpetration of attacks on Tutsis. He has also been accused of murdering two religious leaders and attacking several important buildings, including the University of Butare and its hospital, the dispensary at Matyaro, the Market Square

in Kibilizi, and several others. There are also reports that many women and girls were raped during the attacks. Muvunyi directly ordered many of these attacks and, though he knew about other attacks because of his rank and position, he took no steps to prevent them from occurring. Yet, despite the mounting allegations from the Prosecution, the ICTR refused to uphold the charge for acts of genocide.

On February 5, 2000, Muvunyi was arrested and transported to the ICTR. Six years later, on September 12, 2006, Muvunyi received his guilty verdict and was sentenced to 25 years in prison. On August 29, 2008, the Appeals Chamber set aside all convictions and the previous sentence, ordering a retrial on one charge of direct and public incitement to commit genocide. The indictment alleges that Muvunyi spoke at a meeting at the Gikore Centre in 1994 and incited the killing of Tutsis. The retrial recommenced on July 17, 2009, and on February 11, 2010, the Tribunal found Muvunyi guilty of direct and public incitement to commit genocide, sentencing him to fifteen years in prison, with the five years he has already served credited to his term.

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

JUDGMENT SUMMARY: *THE PROSECUTOR V. HORMISDAS NSENGIMANA*, CASE NO. ICTR-01-69-T

On November 17, 2009, the ICTR Trial Chamber I issued its judgment in *Prosecutor v. Hormisdas Nsengimana*. The Prosecutor had charged Nsengimana, a Catholic priest and Rector of the Collège Christ-Roi during the Rwandan genocide, with charges of genocide, conspiracy to commit genocide, and murder and extermination as crimes against humanity. The Chamber acquitted Nsengimana on all charges.

Nsengimana was arrested at a monastery in Cameroon in March 2002 and transferred to the Tribunal the following month. He quickly pled not guilty, and his trial commenced on June 22, 2007. The trial concluded on September 17, 2008 after testimony by nineteen witnesses for the Prosecution and 24, including Nsengimana, for the Defense.

The allegations against Nsengimana included individual criminal responsibility — through planning, instigating, ordering, committing, and aiding and abetting — for the killing of Tutsi priests, students, women, children, refugees, and a judge between April 6 and May 31, 1994. In addition, Nsengimana was charged on the theory of superior responsibility for the genocidal acts of employees and students at the Collège as well as members of *Les Dragons*, or *Escadrons de la Mort*, a band of Hutu extremists in Nyanza for whom the priest was alleged to have been a spiritual advisor.

The Chamber quickly disposed of the charge of superior responsibility, finding the evidence insufficient to establish Nsengimana's effective control over students and staff at Collège Christ-Roi during the genocide. Notably, the Chamber found that Nsengimana did hold *de jure* authority over the Collège community. However, noting the "vital role" played by other civilian superiors who were deemed responsible for the acts of the principal perpetrators of the relevant crimes, the Chamber found the priest's *de jure* authority insufficient by itself to establish effective control. Moreover, although he met frequently with members of Collège staff known to have committed a number of killings, the evidence failed to prove that Nsengimana exercised sufficient control over these staff members to support a finding of *de facto* authority. The Chamber also found no direct evidence of the priest's "spiritual authority" over any of the assailants during the course of the killings in April and May 1994. Thus, the Prosecution failed to prove that Nsengimana was responsible for the actions of his students or staff.

With regard to the accused's alleged direct responsibility for genocide, the Prosecutor charged that Nsengimana was involved in both planning and carrying out genocidal acts. With respect to planning, the Prosecution alleged that, between 1990 and May 1994, Nsengimana met with Hutu extremists implicated in the killing of Tutsis in April and May 1994 and that, by virtue of his role as spiritual advisor to these Hutus, the accused played a prominent role in planning the genocidal acts. However, the Chamber found insufficient evidence to support finding beyond a reasonable doubt that the accused participated in such meetings. The Chamber also found insufficient evidence to support the

Prosecution's allegation that Nsengimana played a role in stockpiling machetes at the Collège between 1991 and April 1994.

With regard to the accused's participation in acts of genocide in April and May 1994, the Prosecution specifically alleged that the priest was involved in: (1) the killing by several Collège employees of a number of Tutsi civilians in the Mugonzi *cellule* following a meeting at or near the Collège on May 3, 1994; (2) the removal of three Tutsi priests from an orphanage in Nyanza on May 4 and their subsequent murder at a roadblock; (3) the abduction and murder of Xavérine and her son from the École Normale Primaire; (4) the killing of Callixte Kayitsinga, a Tutsi who sought refuge at the Collège, by a Collège employee, Phénéas Munyarubuga; (5) the killing of Judge Jean-Baptiste Twagirayezu behind the Nyanza parish church immediately after he left Collège Christ-Roi; and (6) the abduction and murder of Tutsi civilians, including eight children, from the Don Bosco orphanage on May 22. The Trial Chamber found that the perpetrators intentionally killed Tutsis in each of these episodes and that the perpetrators intended to destroy the Tutsi group in whole or in substantial part. However, the Chamber also found no credible evidence to support the Prosecutor's allegations that Nsengimana planned, ordered, instigated, or committed these attacks. The Chamber noted that "[w]hile [Nsengimana] was seen on occasion in the company of local government or security officials at roadblocks, these sightings do not compel the conclusion that he invariably supported any of the killings charged against him."

On the second and third counts of the Indictment — murder and extermination as crimes against humanity — the Prosecutor relied on the same events as above. Again, the Chamber found ample proof that the widespread killings of Tutsi in Nyanza, Butare prefecture, and Rwanda more generally in April and May 1994 constituted crimes against humanity. But the evidence again failed to establish Nsengimana's criminal liability for any of the killings.

The priest's acquittal was announced a day after another prominent alleged *genocidaire* was also acquitted. The decisions sparked immediate protests and accusations of "malpractice" and lax efforts by the Prosecution from victims' advocates in Kigali. In late March 2010, Nsengimana

was transferred out of East Africa; once more a free man, he has resumed pastoral duties in a village in northern Italy.

Cyrena Khoury, a J.D. candidate at the Washington College of Law, wrote this judgment summary for the Human Rights Brief. 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.

SENTENCING JUDGMENT SUMMARY: THE PROSECUTOR V. MICHEL BAGARAGAZA, CASE NO. ICTR 05-86-T

On November 5, 2009, ICTR Trial Chamber III sentenced Michel Bagaragaza to eight years in prison, with a credit for time already served. The Chamber imposed the sentence after accepting a plea bargain on September 17, 2009, through which Bagaragaza agreed to plead guilty to complicity in genocide.

Bagaragaza was born in 1945 in the *commune* of Giciye in the Gisenyi Prefecture of Rwanda. Before the genocide began in April 1994, he was a member of *Mouvement Révolutionnaire National pour le Développement* (MRND), the Rwandan political party led by President Juvenal Habyarimana. Bagaragaza was also a member of the Akazu, a group of powerful Rwandans who formed Habyarimana's inner circle. As a result of his political connections, Bagaragaza was chosen to direct the Rwandan Tea Authority, an industry comprised of eleven tea factories and over 55,000 workers.

Bagaragaza was initially indicted by the ICTR on three counts: conspiracy to commit genocide; genocide; and complicity in genocide as an alternative to the second count. He voluntarily surrendered to the ICTR on August 15, 2005 and, at his initial appearance before the Tribunal, pled not guilty to each of the charges. He was then transferred to the detention facility of the ICTY in The Hague due to security problems arising from his decision to voluntarily surrender. On February 13, 2006, the Prosecutor moved to transfer Bagaragaza's trial to Norway pursuant to Rule 11*bis* of the ICTR's Rules of Procedure, which allows a Trial Chamber "to refer a case to a competent national jurisdiction for trial if it is satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out." However,

the Chamber presiding over Bagaragaza's case denied the motion on the ground that Norway did not have any provision against genocide in its domestic criminal law. On April 13, 2007, the Chamber granted a motion for the trial to be transferred to the Netherlands, but rescinded its approval just days later on the advice of the Netherlands' justice ministry, which had cast doubt on whether its courts could successfully try the case. Finally, days before Bagaragaza's trial was to commence before the ICTR, the Prosecutor and Defense reached a plea agreement in which Bagaragaza would plead to complicity in genocide, and submitted it to the Trial Chamber.

In the plea agreement, Bagaragaza admitted that he "substantially contributed to the massacre of more than one thousand members of the Tutsi ethnic group who had sought refuge at Kesho Hill, in the Kabaya area, and at Nyundo Cathedral in Gisenyi préfecture." Specifically, after meeting with MRND leaders who advocated committing genocide against Tutsis and sympathetic Hutus in April 1994, Bagaragaza directed his subordinates to stockpile weapons and other supplies in several tea factories. Bagaragaza also arranged for a local *Interahamwe* chapter to be trained and equipped in Gisenyi préfecture. After the outbreak of violence, Bagaragaza provided additional assistance to a number of other *Interahamwe* units, repeatedly directing his subordinates to give *Interahamwe* members fuel and vehicles from factory stockpiles in order to enable them to commit genocidal acts against the Tutsis taking refuge at Kesho Hill and Nyundo Cathedral. Bagaragaza also directed his subordinates to supply the *Interahamwe* with alcohol in order to encourage individual members to continue their attacks in other regions.

As reviewed by the Trial Chamber, the jurisprudence of the ICTR has defined complicity in genocide as aiding and abetting, instigating, or procuring acts of genocide. While acts constituting aiding and abetting may occur at the planning, preparation, or execution stage of the crime, or after the act of the principal offender, the accomplice must carry out an act of "substantial practical assistance, encouragement, or moral support to the principal offender, culminating in the latter's actual commission of the crime." Thus, although the assistance "need not be indispensable to the crime, it must have a substantial

effect on the commission of the crime." In terms of *mens rea*, complicity by aiding and abetting requires only that the accomplice was aware of the specific genocidal intent of the principal perpetrators; it is not necessary that the accomplice himself shared that genocidal intent.

Based on the admissions of Bagaragaza in the plea agreement submitted by the parties, the Trial Chamber determined that he substantially assisted the killings of more than 1,000 Tutsis in Gisenyi, with the knowledge of the perpetrators' intent, and thus the Chamber accepted the plea agreement. It then went on to determine an appropriate sentence based on the gravity of the crime and aggravating and mitigating factors. First, the Chamber acknowledged that the crime of genocide is particularly heinous and repugnant within human society. However, the Chamber cited evidence that Bagaragaza did not personally plan or execute any of the attacks, and did not share the genocidal intent held by the MRND and *Interahamwe* members whom he assisted. Second, the Chamber noted that the Prosecutor did not enter any aggravating factors into the record. Third, the Chamber discussed a variety of mitigating factors. For instance, Bagaragaza had not shown any personal animosity or bias towards Tutsis before the outbreak of violence. He did not refuse to engage in business dealings with Tutsis, and he had two children with a Tutsi mother who he sheltered throughout the genocide. Also, as mentioned before, his actions were not motivated by an intention to commit genocide against the Tutsis. Instead, the Chamber found it more likely that he acted out of concern for the safety of his family. Additional mitigating factors to which the Chamber gave credence were the fact that Bagaragaza voluntarily surrendered, confessed to the crime of complicity in genocide, and demonstrated remorse for his role in the genocide. Lastly, the Chamber gave significant weight to Bagaragaza's commitment to cooperating with the Prosecutor, noting that Bagaragaza had agreed to provide the Prosecutor with information about other responsible parties and had testified for the Prosecution in the trial against Protais Zigiranyirazo, President Habyarimana's brother-in-law.

In addition to the gravity of the offense and aggravating and mitigating circumstances, the Chamber recognized that its sentence must comport with goals of pun-

ishment such as retribution, deterrence, rehabilitation, and protection of society. In light of the severity of the crime of genocide, the Chamber was primarily concerned with the first two goals. Furthermore, it found that rehabilitation and protection of society were less important because Bagaragaza was an elderly family man who expressed remorse in his actions. Finally, the Chamber considered sentences handed down in past cases from the ICTR and the ICTY.

The Prosecutor and Defense jointly submitted a sentence recommendation of six-to-ten years in prison. Although the Chamber noted that it was not required to abide by the recommendation, it ultimately followed the joint recommendation by sentencing Bagaragaza to eight years in prison.

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

INTERNATIONAL CRIMINAL COURT

ICC PROSECUTOR INITIATES INVESTIGATION OF ELECTION VIOLENCE IN KENYA

On March 31, the International Criminal Court (ICC) Pre-Trial Chamber II authorized the Prosecutor's investigation into the 2007 post-election violence in Kenya that resulted in over 1,100 deaths, hundreds of rapes, and the displacement of at least 350,000 people. Though the Kenyan government chose not to refer the situation to the ICC, the Prosecutor has gathered enough facts to support a reasonable basis for the belief that crimes against humanity were committed in the weeks following Kenya's 2007 presidential election. This marks the first time that the ICC Prosecutor has personally referred a situation to the ICC for an investigation, instead of a referral from the UN Security Council or a State Party to the Rome Statute.

After the victory of the incumbent, Mwai Kibaki, in Kenya's December 2007 presidential election, civil unrest broke out as ethnic Luo supporters of his opponent, Raila Odinga, accused Kibaki and his ethnic Kikuyu support base of corruption. Violence between the Kikuyu and Luo

tribes escalated, until Kibaki and Odinga opted to form a unity government at the urging of former UN Secretary-General Kofi Annan. Though the new administration intended to establish a tribunal to prosecute those who organized and financed the violence, Kenya's parliament failed to conduct a successful vote to establish such a tribunal. Meanwhile, throughout 2008, the ICC Prosecutor collected a great deal of information from human rights workers, journalists, and diplomats about what had occurred. While visiting Kenya to speak with President Kibaki and Prime Minister Odinga in November 2009, the Prosecutor expressed his intention to refer the situation to the ICC through his authority under Article 15 of the Rome Statute to refer situations *proprio motu*. He filed his 1,500-page request on November 26.

The Pre-Trial Chamber's three-judge panel approved the Prosecutor's request on March 31 in a two-to-one decision. The majority found that the facts provided by the Prosecutor met the low "reasonable basis for belief" standard of proof required to approve an investigation, agreeing that he had established a reasonable basis to believe that the widespread, systematic, and ethnically-based targeting of victims by well-organized groups may constitute crimes against humanity. However, dissenting Judge Hans-Peter Kaul did not agree that the incidents could amount to crimes against humanity. Specifically, Judge Kaul did not find that the suspected parties acted as a "state" or pursuant to any state-like "organizational policy" as specified in Article 7(2)(a) of the Statute, and therefore, they could not be investigated under the ICC's jurisdiction.

Following the March 31 decision, the Prosecutor submitted a list of twenty suspects to the Pre-Trial Chamber, but the names have yet to be publically released. The list includes prominent businessmen and politicians, some currently in office, who are accused of funding and orchestrating the crimes. Kenyan Justice Minister Mutula Kilonzo welcomed the investigation, and some politicians suspected of involvement in the violence have expressed their willingness to face the Court.

Chris Valvardi, a J.D. candidate at the American University Washington College of Law, wrote this column on the International Criminal Court for the Human Rights Brief.

ICC JUDGE ORDERS RELEASE OF INTERMEDIARY'S IDENTITY

On March 15, 2010, the ICC Judge Adrian Fulford ordered the identity of an intermediary be disclosed to the defense, an event that may help Thomas Lubanga Dyilo's defense team refute testimony of prosecution witnesses regarding Lubanga's involvement in recruiting child soldiers. Lubanga, according to the Prosecution, was a *Union des Patriotes Congolais* (UPC) leader in the Democratic Republic of Congo, and is accused of conscripting children under the age of fifteen years into armed groups, enlisting children into armed groups and using children to participate actively in armed conflict. His trial, the first-ever before the ICC, began on January 26, 2008. The intermediary in question is accused of bribing various people in the town of Bunia to falsely implicate Lubanga. The order to release the intermediary's identity came after the defense's tenth witness had testified behind closed doors.

According to the Head of the Jurisdiction Complementarity and Cooperation Division of the Office of the Prosecutor (OTP), Béatrice Le Fraper du Hellen, "Intermediaries are people in the field who put the OTP in contact with potential sources and witnesses, and describe to the OTP the situation on the ground." Suggesting they are rarely used in trial proceedings, she further stated that intermediaries are not investigators and are never called as witnesses. The Prosecution says it is in the process of appealing this ruling. The Prosecution's Mahoj Sachdeva said the disclosure would have "grave consequences in terms of the potential safety of our intermediaries."

On March 17, the Defense called a former Prosecution witness, who admitted to the Court last June that he fabricated testimony. Referred to as "Witness 15," he stated that an intermediary encouraged him to lie before he talked to OTP investigators. Reports are unclear as to whether it is the same intermediary whose identity is to be released. In 2005, "Witness 15" told investigators that military training camps run by the UPC indoctrinated children as young as twelve years old and that he frequently saw UPC commanders go to the UPC headquarters to meet with Lubanga. However, he then recanted, stating that he was never a soldier and never saw UPC commanders

meet with Lubanga. His testimony continued into the following week.

This evidence and the release of the intermediary's identity are part of the Defense's overall strategy to prove that Prosecution witnesses knowingly testified to false information with the encouragement of intermediaries. According to its opening statement on January 27, 2010, the Defense hopes the Court will stop the case due to abuse of process. However, if the case continues, the Defense will argue that Lubanga "did not take deliberate part in the common plan to recruit minors" and that he attempted to demobilize the minors who had joined the Patriotic Forces for the Liberation of Congo.

John Coleman, a J.D. candidate at the American University Washington College of Law, wrote this column on the International Criminal Court for the Human Rights Brief.

SUDAN'S PRESIDENT MAY STILL FACE CHARGES OF GENOCIDE

In March 2009, the ICC issued its first arrest warrant for a sitting head of state, approving the Prosecutor's application for the arrest of Sudanese President Omar al-Bashir on charges arising out of the situation in Darfur. The charges initially brought against Bashir included war crimes, crimes against humanity, and genocide; however, the Pre-Trial Chamber originally rejected the counts of genocide proposed by the Prosecutor. Recently, the Appeals Chamber determined that those counts were rejected under an incorrect

legal standard, and directed the Pre-Trial Chamber to re-examine the possibility of holding Bashir accountable for state-sponsored genocide. As yet, no date has been set for the Pre-Trial Chamber to revisit the issue. The decision puts further weight behind efforts to bring Bashir before the Court and further refines the ICC's threshold for attributing genocidal intent to high-ranking government leaders.

The UN Security Council's referral of the Darfur situation to the ICC through Resolution 1593 did not explicitly address the subject of genocide; however, the Prosecutor's July 2008 warrant application tied a large number of crimes against the residents of Darfur to genocidal intent at the highest levels of the Sudanese government. The warrant application listed three counts of genocide among the ten counts against Bashir, noting that he used the state apparatus to kill members of three targeted non-Arab ethnic groups; to inflict serious physical and mental harm through rape, torture, and displacement; and to deliberately inflict conditions of life calculated to destroy those groups. To meet the "reasonable grounds" standard required for issuance of a warrant under Article 58 of the Rome Statute, the Pre-Trial Chamber has to infer genocidal intent from the facts produced by the investigation.

Despite the Prosecutor's efforts, the Pre-Trial Chamber decided to issue the initial arrest warrant without the genocide counts. The Chamber explained that, although the results of the investigation may have supported counts of genocide, those results could also support various

other inferences, and did not conclusively establish the reasonable likelihood of genocidal intent. The Prosecutor requested and received permission to appeal this decision in order to resolve uncertainty as to the standard of proof.

Subsequently, the Appeals Chamber held that the Pre-Trial Chamber acted erroneously in basing its rejection of the genocide counts on the grounds that genocide was not the only possible conclusion. The Chamber distinguished the Article 58 "reasonable grounds for belief" standard from higher standards necessary to confirm charges or obtain a conviction. The Appeals Chamber found that the Pre-Trial Chamber's reasoning too closely approximated the "beyond reasonable doubt" standard required for conviction, rather than the less restrictive "reasonable grounds" standard for the issuance of the arrest warrant.

The Appeals Chamber did not go so far as to approve the addition of the genocide counts, instead remanding the case to the Pre-Trial Chamber. Meanwhile, Bashir received overwhelming support in Sudan's presidential elections in April — the country's first democratic elections in 24 years — primarily because the major opposition party in Southern Sudan boycotted the election and hundreds of thousands of Darfurians are not registered voters.

Chris Valvardi, a J.D. candidate at the American University Washington College of Law, wrote this column on the International Criminal Court for the Human Rights Brief.

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