Updates from the International and Internationalized Criminal Courts

Slava Kuperstein
*American University Washington College of Law*

Lindsay Roberts
*American University Washington College of Law*

John Coleman
*American University Washington College of Law*

Beka Feathers
*American University Washington College of Law*

Anna Naimark
*American University Washington College of Law*

*See next page for additional authors*

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Authors
Slava Kuperstein, Lindsay Roberts, John Coleman, Beka Feathers, Anna Naimark, and Ivan Carpio
**INTERNATIONAL CRIMINAL COURT**

**ICC Prosecutor Declines To Pursue DRC Allegations In Bemba Case**

In June 2010, Congolese victims who claimed to have suffered crimes at the hands of the Movement for the Liberation of Congo (MLC) asked the Pre-Trial Chamber of the International Criminal Court (ICC) to review the Prosecutor’s decision not yet to prosecute Jean-Pierre Bemba Gombo for crimes allegedly committed in the Democratic Republic of Congo (DRC). Bemba is the former vice president of Congo and leader of the MLC, a group that controlled a large part of northeastern and northwestern Congo from 1998 to 2003. The Prosecutor charged Bemba with two counts of crimes against humanity and three counts of war crimes for his alleged role in rape, murder, and pillaging committed during the 2002-2003 coup d’etat in the Central African Republic (CAR). The Office of the Prosecutor (OTP) and Human Rights Watch have also implicated Bemba’s MLC in several crimes against civilians in northern Congo, stemming from a military operation initiated by the group in 2002. The OTP will try to prove that Bemba had command over the MLC troops in the CAR, but has yet to indicate any intention of prosecuting the crimes allegedly committed in the DRC.

On October 25, Pre-Trial Chamber I declined the Congolese victims’ request. Victims’ rights in this capacity are addressed by Article 15(3) of the Rome Statute of the ICC, which allows victims to make representations to the Pre-Trial Chamber. Pre-Trial Chamber I explained that the Prosecutor has not yet made a formal decision not to investigate the alleged crimes in the DRC. In response, human rights organizations have noted that no action has been taken despite the Prosecutor’s use of the MLC’s modus operandi in the DRC to demonstrate that Bemba should have known MLC troops were likely to commit crimes in the CAR. Because the Prosecution is using the MLC’s modus operandi as part of its case in the crimes allegedly committed in the CAR, these groups believe that the Prosecutor has evidence and information about how the MLC functioned in the DRC.

Mariana Pena, the permanent representative to the ICC of the International Federation for Human Rights, contends that the lack of a decision to prosecute Bemba thus far for crimes committed in the DRC is telling:

> The Prosecutor has not said formally he isn’t going to prosecute Bemba [over these allegations], but his trial is starting and there have been no attempts over the last two or three years to charge him with crimes in DRC, so you read from the context there is no intention to prosecute.

Although an ICC spokesman has said that further legal action is not ruled out, the Prosecutor has already elected to delay prosecution regarding the alleged crimes in the DRC. Even if further legal action is planned, the Prosecutor could potentially miss his window to prosecute Bemba for his alleged crimes in the DRC. Article 67(c) of the Rome Statute of the ICC provides that among the rights of the accused is the right “[t]o be tried without undue delay.” If a separate trial were to be brought against Bemba in the future, his defense could potentially argue that this right has been violated by the Prosecutor’s failure to act in the interest of efficiency by excluding these charges in the first trial. By comparison, the International Criminal Tribunal for Rwanda has “considered that an inexcusable delay attributable to the Prosecutor . . . entitles the accused to have the charges dropped ‘with prejudice’ to the Prosecutor . . . .” In a specific instance, the Human Rights Committee considered that Canada violated the International Covenant on Civil and Political Rights’ provision (upon which the Rome Statute’s is modeled) for trial without undue delay when the preparation for an appeal hearing resulted in a three-year delay.

Bemba’s defense could also look to Article 60(4) to argue that the Pre-Trial Chamber in a future case is obligated to release Bemba. Article 60(4) provides:

> The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.

The success of these potential arguments hinges upon the Pre-Trial Chamber’s interpretation of the statute. However, the Prosecutor’s decision not to include all possible charges against Bemba in the first complaint could unnecessarily provide an opportunity for Bemba to escape facing further charges. It is possible that the evidence used to establish the aforementioned modus operandi does not provide a sufficient basis for filing additional charges. Nevertheless, reluctance to file charges with regard to Bemba’s alleged crimes in the DRC calls into question the thoroughness and completeness of the OTP’s current case.

**Prosecutor Threatens ICC Involvement In Ivory Coast**

On December 21, 2010, International Criminal Court (ICC) Prosecutor Luis Moreno-Ocampo issued a statement on the situation in Côte d’Ivoire (Ivory Coast). Ivory Coast is now steeped in violence following incumbent president Laurent Gbagbo’s refusal to hand over his office to Alassane Ouattara, winner of November’s presidential elections. The situation has not escaped the attention of the United Nations, and was highlighted in a report from Kyung-wha Kang, the UN deputy high commissioner for human rights to a special session of the UN Human Rights council in Geneva. “Between December 16 and December 21, human rights officers have substantiated allegations of 173 killings, 90 instances of torture and ill treatment, 471 arrests and detentions, and 24 cases of enforced or involuntary disappearances,” reported Kang.

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In making this statement, the Prosecutor has made a political statement by exerting pressure with the threat of possible ICC intervention. Ocampo promised that he would open an investigation should any “serious crimes” under the jurisdiction of the ICC be committed. The Prosecutor specifically mentioned Charles Blé Goudé, a youth leader who has used incendiary language during daily-televised rallies, warning him of the possible consequences. Ocampo also warned that the UN would respond if its peacekeepers or forces were attacked, which has been a concern.

Ocampo continued by suggesting that African states can find a solution to the problem. But, failing that, “African states could be willing to refer the case to my Office and also provide forces to arrest those individuals who commit the crimes in Côte d’Ivoire.” This last statement appears to be encouraging domestic institutions to handle the situation. This goal falls under the prerogative of complementarity, a principle based on the idea that the ICC is a “court of last resort,” and will only initiate proceedings where domestic jurisdictions are unwilling or unable to investigate and prosecute crimes within the jurisdiction of the court.

This action speaks to the role of politics and persuasion within the Prosecutor’s work. While it appears that the Prosecutor’s statement is attempting to advance the call for complementarity and prevent crimes from being committed, states may question whether his chosen method in this instance was an appropriate one. In attempting to force Ivory Coast’s hand in this matter, the OTP is exerting a measure of political pressure. Given that Ivory Coast is not a party to the Rome Statute, the prosecutor would be required to open a case in this situation via ad hoc submission pursuant to Article 12(3) of the Rome Statute or Security Council referral, outlined in Article 13(b). The Prosecutor could contend that the ultimate goals, encouraging the intervention of domestic institutions and prevention of further violence, are within his authority. The Prosecutor made no mention of whether the Ivory Coast is “unwilling and unable” to handle the matter domestically, a requirement set forth by the Rome Statute, making the discussion of an investigation potentially premature. This, combined with statements promising prosecutions prior to the initiation of formal investigations, could lead States Parties to the Rome Statute to question whether the Prosecutor is overstepping his boundaries.

Another concern is whether the Prosecutor’s actions could be used against him in court should the OTP proceed with an investigation and eventual prosecution. Potentially, the accused could argue that the Prosecutor has taken a prejudicial stance regarding guilt prior to the investigation. Given all of the existing political pressure on Ivory Coast, it is debatable whether potentially circumventing the rules and procedures of the ICC in exchange for additional political pressure advances the ICC’s cause. Additionally, in future instances, if the Prosecutor were to act in a similarly preemptive capacity, it is unclear how States Parties to the Rome Statute would react. Perhaps it will engender further complementarity, but it is conceivable that this will be another point of criticism for states such as Kenya, which has recently been reluctant to cooperate with the Court, to further question the ICC’s authority.

On January 25, 2011, the Prosecutor announced that he began collecting information about the alleged violations in Ivory Coast. “The judges have to be sure, my job now is to define if we have to intervene or not?” he stated, adding that his “job is not political.” The OTP has taken a position to work towards complementarity and to discourage potential violence—both of which are primary goals of the ICC. But the means by which the OTP has acted to achieve these ends are political ones, leaving it vulnerable to further criticism and a continued lack of cooperation from various States.

Slava Kuperstein, a J.D. candidate at the Washington College of Law, covers the International Criminal Court for the Human Rights Brief.

**INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA**

**ICTR PERMITS DISCLOSURE OF CONFIDENTIAL WITNESS TESTIMONY TO FRANCE**

On September 16, 2010, the International Criminal Tribunal for Rwanda (ICTR) ruled to vary witness protective measures in *Nzabonimana*, allowing the disclosure of confidential witness information to assist France in its investigation and domestic prosecution of international crimes committed in Rwanda in 1994. The tribunal relied on its decision in *Nyamamasuhuko et al.*, in which protected testimony was disclosed to Danish authorities on the basis that the principle of state cooperation articulated in Article 28 of the ICTR statute also applies to requests from states to the tribunal. Although the decision in *Nzabonimana* is not entirely unique, it indicates that the ICTR’s liberal approach to granting protective measures may extend beyond the life of the tribunal, particularly in relation to the domestic prosecution of international crimes.

The ICTR stated in the *Nzabonimana* decision that it does not grant witness protective measures based solely on a witness’s subjective fear of testifying, but also considers an objective standard when determining whether the witness’s security it threatened. Despite this intention, the ICTR has been criticized for its zealous approach to granting protective measures. Professor Göran Sluiter suggests that protective measures have been granted as an automatic right rather than a provision for exceptional circumstances in which a witness’s security is threatened, which may be inconsistent with the principle of transparent trials.

Rule 75(F) of the ICTR Rules of Procedure and Evidence provides that witness protective measures are effective until altered by the tribunal. To alter or remove protective measures, the tribunal has held in practice that the party seeking variation must demonstrate that the protected witness gave his or her clear consent to the variation, or that the situation that initially justified the protective measures has changed. In *Nzabonimana*, the Prosecutor submitted an affidavit from the witness giving his full consent to the disclosure of materials to French authorities. However, if the witness does not consent to the variance of protective measures, the tribunal has considerable discretion in determining whether to amend the measures.

The ICTR anticipates that amending witness protective orders will remain an issue following the completion of proceedings. Therefore, in light of the many orders issued, the tribunal suggested a limited review of witness protection orders it expects will require alteration, rather than a comprehensive review of all protection
orders. The Office of Legal Counsel is considering the most effective manner to conduct such a review.

Whatever the tribunal’s ultimate approach, its policy could significantly affect witness security and international criminal justice, particularly if the tribunal varies or rescinds protective measures without the witness’s consent. If the ICTR decides whether or not to vary or rescind protective measures in advance of a request, it risks not accounting for future, unknown circumstances that could threaten the security of a witness. Consideration of possible threats to a witness’s security becomes more complicated as non-parties, such as France, seek access to testimony for national prosecution of international crimes.

The ICTR must balance the challenge of amending a large number of witness protective measures without knowledge of future circumstances that could threaten witnesses’ security with the need for tribunal documents to be publicly available to promote state cooperation with the ICTR. As states, such as France, prosecute international crimes in domestic courts, documents from international tribunals could be invaluable resources to fair and efficient proceedings. Although the ICTR has liberally granted witness protective measures, it must nevertheless prioritize witness security as it seeks to efficiently review a large number of orders.

**SECURITY COUNCIL VOTES TO ESTABLISH ICTR RESIDUAL MECHANISM**

On December 22, 2010, the Security Council voted on S/RES/1966 (2010) (Resolution 1966) to establish the International Residual Mechanism for Criminal Tribunals (Mechanism). As the international community has anticipated the end of tribunal proceedings, informal working groups sought to determine the best way to address residual issues. The groups debated topics including: whether the necessary residual functions required semi-permanent institutions or ad hoc responses, whether one mechanism should be established for all international criminal tribunals or if each tribunal should have its own mechanism, and the extent to which cost and efficiency should influence the options. Resolution 1966 establishes separate Mechanisms for the International Criminal Tribunal for Rwanda (ICTR). The Mechanism for the ICTR will continue the “jurisdiction, rights and obligations, and essential functions” of the ICTR beginning July 1, 2012.

State cooperation with the Mechanism will be necessary to ensure that it remains a “small, temporary and efficient structure” with its operations reducing over time, and does not develop into a complex replacement institution. The ICTR’s December 2010 Completion Strategy Report highlighted many issues that will be of concern to the Mechanism and cooperating states, such as prosecution of remaining fugitives and relocation of individuals acquitted or convicted by the ICTR or the Mechanism.

The ICTR has not yet prosecuted ten indicted fugitives that remain in neighboring countries. The ICTR particularly seeks cooperation from the Democratic Republic of the Congo, where most of the fugitives remain, and Kenya, where Félicien Kabuga, accused of financing the 1994 genocide, allegedly lives. While the ICTR has attempted to work with national police to arrest the fugitives, the Mechanism will likely inherit the responsibility of prosecuting them upon arrest. Article 1 of the Mechanism’s Transitional Arrangements states that the Mechanism “shall have competence over” a fugitive arrested after July 1, 2012. However, according to Article 6 of the Statute of the Mechanisms, the Mechanism must make every effort to refer cases to national courts, after considering the gravity of crimes charged and the likelihood that the accused will receive a fair trial. After the Mechanism refers a case to national courts, it must assist the state upon request in the investigation, prosecution and trial of an accused, and monitor the case’s progress.

Additionally, the Mechanism will require state cooperation in relocating individuals who were acquitted or who have served their sentences, but who have not been resettled and remain in safe houses in Arusha. In his speech to the UN Security Council, President of the ICTR Judge Byron explained that some of these individuals are in a “legal vacuum,” and many others will be in similar situations in the future as they complete their sentences. The Mechanism will assume responsibility for ensuring that these persons are relocated, a task necessary to ensure the “interests of justice and the rule of law,” but impossible without state cooperation.

Resolution 1966 passed by a vote of fourteen to none, with Russia abstaining because it believed that the ad hoc tribunals had sufficient time to complete their operations in accordance with the Completion Strategies. Regardless of whether the ICTR completes its operations by the projected date, there will undoubtedly be residual issues that must be addressed to avoid undermining the breakthrough achievements of the ad hoc tribunals. Just as state cooperation is required to promptly fulfill the ICTR Completion Strategy, the subsequent Mechanism will also require state cooperation to ensure its responsibilities gradually diminish, ultimately resulting in the accomplishment of the ICTR mandate.

**DEFENSE IN NGIRABATWARE MOVES TO DISQUALIFY TRIAL CHAMBER II’S JUDGES**

On January 5, 2011, Augustin Ngirabatware’s defense counsel at the International Criminal Tribunal for Rwanda (ICTR) submitted a motion to disqualify Trial Chamber II’s judges pursuant to rule 15(b) of the Rules of Procedure and Evidence. Rule 15 allows a judge to be disqualified from any case in which she has any association that might affect her impartiality. In *Rutaganda*, the ICTR held that judges are presumed to be impartial. In *Nahimana, Barayagwiza, and Ngeze*, the ICTR applied principles articulated by the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber to interpret the impartiality requirement. Specifically, an unacceptable appearance of bias exists if a judge is a party to a case, has a direct interest in the outcome of a case, or if a reasonable observer, someone informed of all the relevant circumstances, including the traditions of integrity and impartiality of judges, and who understand that judges swear to uphold the duty of being impartial, would apprehend bias.

The defense in *Ngirabatware* stated that the judges have shown “such a deep-seated antagonism against the Defence” that a fair trial is “compromised and impossible.” The motion alleges judicial interference during the trial proceedings in favor of the prosecution, such as cutting short defense counsel’s attempts to elicit contradictory evidence from a witness, denial of adequate time for the defense to prepare, undue delay in the Trial Chambers’ deliv-
The defendants in the RUF case in the Special Court for Sierra Leone (SCSL) moved for the disqualification of Judge Bankole Thompson based on the appearance of bias. Judge Thompson had previously written a book in which he stated that the armed organization of which the defendants were members was guilty of human rights violations. Although Judge Thompson believed he could impartially adjudicate the case, his colleagues recused him because a reasonable bystander would likely perceive bias after reading the book. By comparison, Ngirabatware’s motion for disqualification of judges is not based on the appearance of bias from external factors. Instead, the motion is based on internal trial activities and decisions. Additionally, in the SCSL case the defense sought to disqualify one individual judge, rather than an entire panel of judges as in Ngirabatware.

Theodor Meron, a judge in the ICTY and ICTR Appeals Chambers, claims that the structure of international tribunals, which includes a panel of judges that engage in discussion before rendering a judgment, ensures that any individual judge’s latent bias does not influence the outcome of a case. Meron acknowledged that tribunals should not be immune from criticism, but argued that criticism motivated solely by dislike for the results of a case may be “unfounded and excessive.” Ngirabatware’s motion directed at all of the judges assigned to the case, and was introduced late in the proceedings. While the ICTR must fairly evaluate all evidence to ensure that judgment in Ngirabatware is not characterized by systematic bias, it should not disqualify judges based on the defense’s dissatisfaction with the progress of the case. If the ICTR orders the dismissal of an entire trial chamber, the legitimacy of the tribunal’s previous rulings could be compromised.

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Genocide Convention “confirms that public incitement to genocide pertains to mass communications.” Indeed, the drafters of the Genocide Convention, according to the Appeals Chamber, expressly removed “private incitement,” understood as “more subtle forms of communication such as conversations, private meetings, or messages,” from the scope of the definition of genocide.

Turning to the facts before it, the Appeals Chamber determined that Kalimanzira’s instructions were intended only for those manning the roadblocks and not the general public, and thus it reversed his convictions for direct and public incitement to genocide. Judge Pocar delivered a separate opinion on this subject, making clear that while he agreed with the decision to overturn the convictions, he viewed the Appeals Chamber’s emphasis on the size of the audience being incited as setting a dangerous precedent as to what minimum audience size is required to establish direct and public incitement to genocide. Instead, Judge Pocar drew on the ICTR jurisprudence from the Akayesu and Kajelijeli cases and argued that the Appeals Chamber should have considered the circumstances of the incitement, including where the incitement occurred and whether or not the audience was select or limited.

A further conviction for direct and public incitement to commit genocide, based on a speech Kalimanzira allegedly gave at the Nyabisagara football field in Kibayi Commune, was reversed based on a finding that the Trial Chamber had relied exclusively on uncorroborated evidence of a single Prosecution witness and failed to adequately address conflicting evidence presented by five Defense witnesses. On similar grounds, the Appeals Chamber reversed Kalimanzira’s conviction for direct and public incitement to genocide regarding events at the Gisagara Marketplace. The Trial Chamber had relied on a single witness’s uncorroborated statement that Kalimanzira had criticized members of the crowd for being unarmed, and instructed them to kill young Tutsi girls. The Appeals Chamber held that the Trial Chamber failed to provide a clear explanation for accepting the witness’s uncorroborated identification of Kalimanzira.

Kalimanzira also appealed his conviction for aiding and abetting genocide in relation to the massacre at Kabuye hill in April 1994, which was described by the Trial Chamber as an “enormous human tragedy.” Kalimanzira argued that there was insufficient evidence of his substantial contribution to acts of genocide. The Appeals Chamber noted evidence from survivors of the massacre that Kalimanzira had instructed Tutis at the Gisagara marketplace to seek refuge at Kabuye hill, promising safety. Kalimanzira, along with armed soldiers and policemen, had then gone to the hill, and used their firearms to massacre the Tutsis. The Appeals Chamber held that it was reasonable to find that Kalimanzira had provided substantial assistance to the massacre, even if that assistance was unknown to the principal perpetrators of the massacre. The remaining appeal grounds that were rejected by the Appeals Chamber included Kalimanzira’s submissions that his authority and alibi were inappropriately assessed and a sentencing appeal by the Prosecution, which argued that the gravity of the crimes committed necessitated imprisonment for the remainder of Kalimanzira’s life.

While almost all of Kalimanzira’s convictions were reversed, the Appeals Chamber characterized Kalimanzira’s remaining conviction of aiding and abetting the genocide of Tutis at Kabuye hill as “an extremely serious crime.” The Appeals Chamber accordingly sentenced Kalimanzira to twenty-five years imprisonment.

The Prosecution v. Yussuf Munyakazi, Trial Judgment, Case No. ICTR-97-36A-T

On July 5, 2010, Trial Chamber I of the International Criminal Tribunal for Rwanda (ICTR) sentenced Yussuf Munyakazi, who has been in prison since 2004, to a twenty-five year term for his participation in and leadership of the Bugarama Interahamwe during the 1994 Rwandan genocide. The Trial Chamber determined that Munyakazi, a well-known local businessman and rice farmer in Bugarama commune, served as a de facto leader of the Interahamwe in planning and executing two attacks on Tutsi refugees.

Munyakazi was initially indicted by the Pre-Trial Chamber on three counts: genocide, complicity in genocide, and extermination as a crime against humanity. Ultimately, he was found guilty of genocide and extermination as a crime against humanity and not guilty of complicity in genocide, specifically because complicity was charged in the alternative to genocide. The convictions were based on two attacks Munyakazi led on Shangi and Mibilizi parishes between April 29 and 30, 1994, which resulted in the deaths of approximately 5,000 Tutsis. Munyakazi offered two alibis to counter the charges that he participated in the attacks, but the Chamber found neither to be credible. In both instances, the defense failed to present any alibi until just before trial. Additionally, the defense did not provide any witnesses to corroborate Munyakazi’s version of events, which was inconsistent throughout the pretrial examination process.

Although the Prosecution was unable to show evidence that the accused personally killed Tutsi civilians, the Chamber nevertheless found Munyakazi guilty of “committing” genocide and the crime against humanity of extermination under Article 6(1) of the ICTR Statute. As an initial matter, the Chamber recalled the ICTR Appeals Chamber’s holding in the Seromba case that, “in the context of genocide . . . ‘direct and physical perpetration’ need not mean physical killing; other acts can constitute direct participation in the actus reus of the crime.” The question, according to the Seromba Chamber, is whether the actions of the accused “were as much an integral part of the genocide as were the killings which they enabled.” Applying this standard to the case, the Trial Chamber first determined that, although Munyakazi did not hold any official post within the local branch of the MRND, he exercised de facto control over the Bugarama Interahamwe and was the leader of the group’s attacks on Shangi parish and Mibilizi parish. Indeed, witnesses from Shangi and Mibilizi parishes testified that Munyakazi was the one giving orders to the Interahamwe, and witnesses who saw him with other members of the Interahamwe testified that those people behaved as if Munyakazi was their leader. Thus, although the Prosecution was unable to establish beyond a reasonable doubt that Munyakazi was the single de jure leader of the Bugarama Interahamwe, the Chamber was convinced that he was a leader, and one who exercised significant de facto...
control over the group in relation to the relevant attacks.

On the basis of leadership, the Chamber concluded that Munyakazi “was as much an integral part of the killings as those he enabled, and that he approved and embraced the decision to commit the crimes as his own.” Furthermore, the Chamber found that both Shangi parish and Mibilizi parish were attacked with the purpose of eliminating all the Tutsi refugees who had sought shelter there. The Chamber found that it was not clear from the evidence presented whether Munyakazi himself had personal animosity towards the Tutsi people, or if he was simply trying to gain favor with the MRND leadership. The court determined that he had nevertheless demonstrated a specific intent to destroy the Tutsi in Shangi and Mibilizi parishes, as required for the charge of genocide. Furthermore, the Chamber found that Munyakazi knew his actions were part of a “widespread and systematic attack” against the Tutsi people, and therefore also found him guilty of committing extermination as a crime against humanity.

In addition to the attacks on Shangi and Mibilizi parishes, Munyakazi was charged with responsibility for an attack on Nyamasheke parish that occurred on April 16, 1994. Although Prosecution witnesses testified that Munyakazi was the first of the Interahamwe to enter the church and that he appeared to be giving orders, accomplice witnesses for the defense testified that on April 16, 1994, they were with the Bugarama Interahamwe at the CIMERWA cement factory. CIMERWA, which is close to Bugarama, is quite far from Nyamasheke parish, so it would not have been possible for both attacks to occur in a single day. Additionally, three defense witnesses living nearby testified that Nyamasheke parish was attacked several times over a period of days, but not on April 16. The Chamber concluded that the reports of multiple attacks, combined with the distance between CIMERWA and Nyamasheke parish, left a reasonable doubt as to whether Munyakazi participated in an attack in Nyamasheke on April 16, 1994. The Chamber also found that there was insufficient evidence to support the Prosecution’s allegation that Munyakazi participated in a joint criminal enterprise aimed at destroying the Tutsi population, in whole or in part, by providing the Bugarama Interahamwe with housing, food, transportation, weapons and military training.

In sentencing Munyakazi, the Chamber noted that the penalty imposed should “reflect the goals of retribution, deterrence, rehabilitation, and the protection of society.” Furthermore, the Chamber stated that, pursuant to Article 23 of the ICTR Statute, it would consider the general practice regarding prison sentences in Rwanda, the gravity of the offenses, and the individual circumstances of the accused, including aggravating and mitigating circumstances. For the gravity of the offense, the Chamber stressed that the attacks on Shangi and Mibilizi parishes resulted in a substantial number of deaths and a great deal of human suffering. It also recognized that “commission” is a direct form of participation in the crime. Noting that under Rwandan law, similar crimes may be punished by life imprisonment, the Chamber explained that, in the practice of the ICTR, such sentences were “reserved for those who planned or ordered atrocities as well as the most senior authorities.” The only aggravating factor considered by the Chamber was Munyakazi’s abuse of his superior position, while his advanced age was the only mitigating factor to which the Chamber gave weight. The Defense also pointed to the fact that Munyakazi had provided assistance to a select number of Tutsi friends during the genocide, but the Chamber held that it was in its discretion to disregard such “selective assistance” to Tutsis. In the end, the sentence of twenty-five years was imposed as a single sentence for each of the crimes for which Munyakazi was convicted.

Beka Feathers, a J.D. candidate at the American University Washington College of Law, wrote this judgment summary for the Human Rights Brief. Katherine Anne Cleary, Assistant Director of the War Crimes Research Office, edited this summary for the Human Rights Brief.

**THE PROSECUTOR v. DOMINIQUE NTAWUKULILAYO, TRIAL JUDGMENT, CASE NO. ICTR-05-82-T**

On August 3, 2010, Trial Chamber III of the International Criminal Tribunal for Rwanda (ICTR) issued a judgment in the case against Dominique Ntawukulilyayo, former sub-prefect of Gisagara sub-prefecture in Butare. Ntawukulilyayo was found guilty of genocide under Article 2 of the ICTR Statute and not guilty of complicity in genocide and direct and public incitement to commit genocide. He was sentenced to twenty-five years imprisonment.

In its indictment, the Prosecution alleged that Ntawukulilyayo was responsible for genocide or, in the alternative, complicity in genocide, based on his alleged role in events that occurred between April 20 and 25, 1994, at Gisagara market and Kabuye hill. The evidence established that on April 20, 1994, thousands of Tutsis fleeing attacks from Hutus sought refuge at Gisagara market. The following day, several of the displaced persons tried to depart the market for Burundi, but law enforcement personnel prevented them from leaving. From April 21 through April 23, many of the refugees at Gisagara market were ordered to leave the market and go to Kabuye hill where, beginning on April 23, armed civilians, police, and military personnel killed or seriously injured up to 25,000 primarily Tutsi refugees. The Defense did not deny that the events occurred, but claimed that Ntawukulilyayo had no role in relation to the events. According to the Defense, Ntawukulilyayo was never present at Kabuye hill and he only visited the market to inquire about the welfare of the refugees and inform them of his efforts to obtain assistance. By contrast, the Prosecution argued that Ntawukulilyayo bore responsibility for genocide or complicity in genocide based on his role in convincing Tutsis to go to Kabuye hill and his role in the subsequent attack on Tutsis at the hill. The charge of direct and public incitement to genocide was based on two separate counts. The first involved a public address delivered by Ntawukulilyayo on April 24 in which he allegedly promised houses, land, and money to those who killed the most Tutsis. The second count was based on allegations that Ntawukulilyayo had urged a crowd of people gathered in front of the deputy bourgmestre’s house in late May 1994 to search for and kill Tutsis before the arrival of the Rwandan Patriotic Front (RPF).

With regard to the events at Gisagara market and Kabuye hill, the Trial Chamber found insufficient evidence to support the allegations that Ntawukulilyayo ordered the interception of Tutsis seeking to flee to Burundi on April 20 and that he had a role in convincing Tutsis to leave the market for the hill on April 21 and 22. However,
a majority of the Trial Chamber found that Ntawukulilyayo came to Gisagara market on April 23 and told the refugees that they would be fed and protected at Kabuye hill, convincing many refugees to leave the market for the hill. In addition, a majority of the Chamber found that, on April 23, Ntawukulilyayo transported soldiers to Kabuye hill who subsequently attacked the Tutsi refugees. Ntawukulilyayo did not return and the assault continued through the following day, eventually including civilian assailants. Based on these facts, the majority of the Chamber determined that Ntawukulilyayo was responsible for aiding and abetting the killing of Tutsi civilians by instructing the refugees at Gisagara market to move to Kabuye hill and by transporting soldiers who participated in the attack. Although no witness testified to having expressly heard Ntawukulilyayo give instructions to the soldiers he brought to Kabuye hill, the majority found he was liable for ordering the killing of Tutsis based on a finding that “his prominent role in removing Tutsis from Gisagara market to Kabuye hill and his direct involvement in transporting assailants to there” led to the conclusion that he ordered those he transported to kill the Tutsi refugees. Furthermore, due to the systematic and extensive nature of the attack, the majority was certain that the purpose of the attack was to eliminate the majority of Tutsi refugees gathered on Kabuye hill. Finally, the majority found that Ntawukulilyayo had knowledge of the genocidal intent of the Kabuye hill assailants and that he shared in such intent. While the Prosecution also alleged that Ntawukulilyayo was guilty of genocide under a theory of superior responsibility pursuant to Article 6(3) of the ICTR Statute, the Chamber found insufficient evidence demonstrating that, as sub-prefect, Ntawukulilyayo had the material ability to prevent the commission of offenses by communal police, soldiers, and civilian assailants or to punish those who committed offenses. Having convicted Ntawukulilyayo of genocide, the alternative of complicity in genocide was dismissed.

Judge Akay dissented from the majority regarding Ntawukulilyayo’s conviction of genocide. While he found the evidence of events at Gisagara and Kabuye hill to be generally sound, the inconsistencies within witness testimonies raised doubts regarding Ntawukulilyayo’s involvement in the events. According to the Akay, the specific accounts of Ntawukulilyayo’s whereabouts were far too inconsistent. He also found the Defense’s evidence that market traders and residents were responsible for instigating the flight of the refugees from the market because of deteriorating hygiene conditions credible. Furthermore, he stressed that witness statements about the timing of Ntawukulilyayo’s arrival at Kabuye hill along with the type of vehicle he arrived in varied. Judge Akay acknowledged that the tense situation may have distorted the witnesses’ views, but he also found that the statements did not corroborate each other sufficiently to support a conviction beyond a reasonable doubt.

For the charge of direct and public incitement to genocide, the Chamber found that the evidence presented by the Prosecution insufficiently supported the allegations in the indictment regarding Ntawukulilyayo’s April 24 promise of housing, land, and money to those who killed Tutsis. The Chamber also was not convinced by the evidence in support of the allegation that Ntawukulilyayo urged a crowd of people to kill Tutsis before the arrival of the RPF in late May. Accordingly, the Chamber unanimously dismissed the incitement charge.

Finally, for purposes of sentencing, the Chamber considered the gravity of the offense for which Ntawukulilyayo was convicted, as well as aggravating and mitigating circumstances. Aggravating circumstances included the fact that he had abused his position of authority in convincing the Tutsi refugees to move from the market to the hill, as well as the number of victims. Mitigating circumstances included Ntawukulilyayo’s age, relative health, and past actions. At the time of sentencing, Ntawukulilyayo was seventy years old and suffering from Diabetes. The Chamber further noted that prior to the 1994 genocide, Ntawukulilyayo devoted part of his professional career to easing ethnic tensions in Rwanda and that the evidence suggested his participation in killings may have resulted from trying to demonstrate his loyalty to the government rather than from any ethnic hatred.

Anna Naimark, a J.D. candidate at the American University Washington College of Law, wrote this judgment summary for the Human Rights Brief. Katherine Anne Cleary, Assistant Director of the War Crimes Research Office, edited this summary for the Human Rights Brief.
Rule 77, Trial Chamber I could direct the prosecution to investigate the matter, initiate procedures itself, or have the registrar appoint an amicus curiae to investigate. In addition, Trial Chamber I, in opposition to the prosecution’s requests, held the prosecution to its previously allotted time in presenting its case. The prosecution is likely to seek testimony from Kabashi and the former KLA prisoner in the retrial to support joint criminal enterprise charges.

The Appeals Chamber based its ruling in Haradinaj et al on what it regarded as an improper balance struck by the Trial Chamber, between addressing witness intimidation and maintaining trial expediency. Given the importance of the witnesses’ testimonies to the prosecution’s case, the Appeals Chamber held that the Trial Chamber’s decision “undermined the fairness of the proceedings . . . and resulted in a miscarriage of justice.” It would be a gross oversimplification to say the takeaway from the Appeals Chamber’s ruling is that fairness considerations trump efficiency concerns. However, witness intimidation complicates ICTY procedure and, in addition to adjudicating cases, Trial Chambers are ultimately responsible for protecting witnesses. In cases involving witness intimidation, the Appeals Chambers’ ruling establishes that the Trial Chambers must be particularly cautious when implementing time constraints to avoid sacrificing fairness in the interest of efficiency.

ICTY Appeals Chamber Grants First-Ever Review Judgment in Šljivančanin Case

On December 8, 2010, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) vacated the May 2009 Appeals Chamber Judgment of Veselin Šljivančanin. The groundbreaking decision overturned Šljivančanin’s conviction for conspiracy to commit murder in light of new testimony undermining the mens rea element of that charge. In a split decision, the Appeals Chamber issued its first review judgment with two judges writing separately and one partially dissenting. Šljivančanin, a former lieutenant colonel in the Yugoslav Peoples’ Army (JNA), was originally sentenced by Trial Chamber III in September 2007 to five years imprisonment for aiding and abetting the torture of prisoners during the 1991 Vukovar massacre. In May 2009, the Appeals Chamber affirmed Šljivančanin’s first conviction and convicted him on an additional charge of aiding and abetting the murder of 194 prisoners during the same incident. Holding that Šljivančanin’s five-year sentence did not sufficiently reflect the gravity of his first conviction and accounting for the new conviction, the Appeals Chamber sentenced Šljivančanin to 17 years’ imprisonment. At the beginning of 2010, Šljivančanin applied for review of the additional conviction of aiding and abetting murder, which resulted in the December 2010 vacation of the Appeals Chamber’s May 2009 judgment.

In considering the defense motion, the Appeals Chamber applied the two-step procedure for evaluating requests under Rules of Procedure and Evidence (RPE) Part Eight. The first stage involved a preliminary hearing in which the defense had the burden of showing that a “new fact,” “which was not known to the moving party at the time of the proceedings before . . . the Appeals Chamber, and could not have been discovered through the exercise of due diligence” had emerged that would have altered the Appeal Chamber’s decision. Having satisfied the first step, the Appeals Chamber then considered the weight of the new evidence and issued its ruling reversing Šljivančanin’s prior sentence in order to prevent a miscarriage of justice.

The RPE designates the chamber from which the judgment in question took place to be the chamber that evaluates judgment review requests. One criticism of this process is that it results in a system where chambers, by virtue of having the discretion to decide what constitutes “new evidence,” could dismiss meritorious requests because the requests conflict with prior rulings. Prior to the success of Šljivančanin’s request for review judgment, all thirteen previous attempts for review judgment at the ICTY were dismissed at the first stage of RPE Part Eight’s process for failure to demonstrate new facts. Instead, the chambers ruled that these were “additional fact(s)” not meeting the standard of review because they were known at the time of the proceedings.

In his partially dissenting opinion, Judge Pocar argued that the Appeals Chamber affirmed Šljivančanin’s first conviction and convicted him on an additional charge of aiding and abetting the murder of 194 prisoners during the same incident. Holding that Šljivančanin’s five-year sentence did not sufficiently reflect the gravity of his first conviction and accounting for the new conviction, the Appeals Chamber sentenced Šljivančanin to 17 years’ imprisonment. At the beginning of 2010, Šljivančanin applied for review of the additional conviction of aiding and abetting murder, which resulted in the December 2010 vacation of the Appeals Chamber’s May 2009 judgment.

Despite the split decision and Judge Pocar’s concerns regarding sentencing and procedural issues, the Šljivančanin review judgment demonstrates that the ICTY is willing to question its own rulings. Although one decision is not enough to indicate a complete change of direction in the ICTY’s use of the review request process, that the Appeals Chamber granted the first successful request for a review judgment after sixteen years of the procedure being functionally dormant is a significant development in international criminal jurisprudence.

2009 Wikileaks Cable Reveals U.S. Support of Croatia’s EU Bid Despite ICTY Opposition

A leaked 2009 U.S. Department of State (DOS) cable from Zagreb, Croatia reveals U.S. support for Croatia’s EU bid despite substantial opposition. The cable, sent on November 30, 2009, and provided to The Guardian by Wikileaks, reveals diplomatic efforts to persuade the UK to change its stance on Croatia’s accession despite International Criminal Tribunal for the former Yugoslavia (ICTY) Prosecutor Serge Brammertz’s critical assessments of Croatia’s cooperation with the ICTY. While it has been public knowledge that Croatia’s EU bid was contingent on cooperation with the ICTY and that the process was held up by the UK and the Netherlands, the Wikileaks cable reveals the complexity of the international political system that the ICTY occupies.

Finding that, “the impasse could undermine the U.S. stake both in the [Prime Minister of Croatia Jadranka] Kosor-led reform process in Croatia and the region’s integration into Euro-Atlantic institutions[,]” the DOS’ Zagreb office recom-
mended contesting Brammertz’s findings at a UN Security Council discussion on the ICTY. The Zagreb office also suggested “consider[ing] high-level approaches to the UK and Netherlands . . . urging that the EU make Croatia’s ICTY cooperation a closing rather than an opening benchmark for Chapter 23 accession negotiations.” The leaked cable shows that French Ambassador Jérôme Pasquier thought France would also be willing to dissent from Brammertz’s conclusion. At the time the Cable was sent, cooperation with the ICTY was a barrier to opening Chapter 23 negotiations – the body of EU treaty law that relates to judiciary and fundamental rights. Accession to the EU is contingent upon the applicant state demonstrating its compliance with Chapter 23. Therefore, Croatia must demonstrate that it has an independent and efficient judiciary, legal guarantees for fair trial procedures, and policies effectively addressing and deterring corruption.

The cable identified Croatia’s failure to provide documents relating to the ICTY’s Gotovina et al. case and artillery documents relating to Operation Storm as a key point of contention between the U.S. assessment of Croatia’s cooperation and Brammertz’s assessment. A specially-created Croatian task force reported that, out of twenty-three documents sought, it had delivered three full documents and one partial draft of a document to the ICTY, four were never created, seven were destroyed, and eight had not yet been found. While U.S. Ambassador Stephen Rapp was satisfied with the task force’s work on addressing ICTY concerns, the cable reported that Brammertz “remain[ed] unwilling to acknowledge the full degree of Croatia’s cooperation.” The cable predicted that, “Croatia could be facing a prolonged and indefinite blockage of its EU accession.”

The cable shows that the U.S. diplomatically lobbied for Croatia, was prepared to challenge the ICTY’s determinations and that the U.S. had interests to protect in Croatia’s government under President Kosar. U.S. consultations with France and appeals to the UK on altering the EU’s stance on Croatia’s compliance with the ICTY provide rare insight into the politics of cooperation with the ICTY and their impact on accession into the EU.

Ivan Carpio, a J.D. candidate at the Washington College of Law, covers the International Criminal Tribunal for the former Yugoslavia for the Human Rights Brief. HRB