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Updates from the International and Internationalized Criminal Courts

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UPDATES FROM THE INTERNATIONAL AND INTERNATIONALIZED CRIMINAL TRIBUNALS

INTERNATIONAL CRIMINAL COURT

MAXIMIZING THE IMPACT OF ICC PRELIMINARY EXAMINATIONS

The primary goal of the International Criminal Court's (ICC) preliminary examinations is to determine whether there are grounds to launch an official ICC investigation into a situation. As a basis for the decision to open an investigation, preliminary examinations have the potential to further the Court's overall goals of ending impunity and deterring future crimes. To successfully achieve these goals, preliminary examinations require a balanced approach. On one hand, the Office of the Prosecutor (OTP) must adopt a consistent method of analysis that provides sufficient information about the investigation to spur national proceedings and alert potential perpetrators of crimes that they could be held accountable. On the other hand, the OTP must adapt to a wide variety of circumstances and cannot provide information that would raise expectations about the Court's involvement, compromise due process, or risk the safety of victims and witnesses. During the first decade of the Court's work, inconsistency among the approaches to preliminary examinations, especially the absence of clear timelines, has limited their effectiveness.

The ICC initiates preliminary examinations in one of three ways: through a decision of the Prosecutor; through a referral from a State Party or the UN Security Council; or through a declaration of a non-State Party pursuant to Article 12(3) of the Rome Statute, under which that State accepts ICC jurisdiction for the preliminary examination and consequent proceedings. In all three situations, the Prosecutor follows the same procedure to determine whether there is a reasonable basis to proceed with an investigation based on three criteria laid out in Article 53(1) of the Rome Statute. The Prosecutor must first determine whether there is temporal, material, and either territorial or personal jurisdiction. Second, the Prosecutor considers whether the case would be admissible, taking into consideration both the gravity of the alleged crimes and whether there

are already sufficient and ongoing national proceedings. Finally, the Prosecutor considers whether ICC proceedings would violate the interests of justice.

In practice, however, the timeline of preliminary examinations conducted by the Prosecutor to date has been inconsistent. Without a clear and predetermined timeline, the Prosecutor has progressed quickly through all three Article 53(1) steps in some situations, while drawing out his analysis in others. In part, these discrepancies are necessary because the time required to analyze Article 53(1) factors varies based on the circumstances. In evaluating admissibility, the Prosecutor must determine whether there are already national proceedings covering the same crimes and individuals that would likely be the focus of an ICC investigation. In the Democratic Republic of the Congo and Uganda, the Prosecutor quickly found that no national proceedings were ongoing and moved to the next phase of his analysis. However, the preliminary examination in Colombia continues because some national proceedings are ongoing. Therefore, the Prosecutor must evaluate whether the national proceedings are genuine and focused on the individuals most responsible before moving to the next phase in his analysis.

Although certain situations require more time to complete all of the Article 53(1) steps, as preliminary examinations in Colombia and other situations are drawn out without even a general timeline, they become less credible. When the Prosecutor quickly decides to open an investigation — as in the Kenya situation — without making a decision about long-term preliminary examinations — in places like Colombia and Afghanistan — it can give rise to the impression that the Prosecutor has been influenced by non-legal factors. Disparate timelines may lead to impressions that the Prosecutor allocates time and resources unevenly among preliminary examinations, and could be mitigated by increasing transparency and establishing general timelines.

As preliminary examinations continue without a decision, potential perpetrators

and national authorities may doubt the seriousness of the OTP's investigations. As the prospect of an ICC investigation fades, there are fewer incentives to comply with the ICC's laws. In this way, prolonged preliminary examinations weaken the Court's ability to deter crimes and encourage national proceedings. The lack of even a general timeline is difficult for victims and affected communities, who have no indication of how long they must wait for justice, or if justice will even come at all.

Preliminary examinations provide a potential avenue for the Court to have a greater impact outside the courtroom. The OTP has taken some positive steps by increasing transparency, but the inconsistent approach to preliminary examinations has weakened their credibility and effectiveness in spurring national proceedings and deterring crimes. By establishing clear guidelines, a general timeline, and consistently providing updates regarding preliminary examinations, the OTP could help the ICC achieve its goals of deterring crimes and ending impunity without even going to trial.

NEW MECHANISMS ESTABLISHED TO FACILITATE MERIT-BASED ICC ELECTIONS

At the Tenth Session of the Assembly of States Parties (ASP) from December 12 to 21, 2011, States Parties to the International Criminal Court (ICC) voted in elections resulting in the largest change in leadership since the ICC's first elections in 2003. The nominations and elections of the Chief Prosecutor and six new judges were significant because two new committees were established to evaluate the qualifications of the candidates for those posts. Such committees have not been used in past elections, and they represent an important step toward a more transparent and merit-based election process.

At the Ninth Session of the ASP in 2010, the ASP established a Search Committee to facilitate the nomination and election of the next Chief Prosecutor with the goal of electing a candidate by consensus. The Search Committee received expressions of

interest or recommendations to consider 52 candidates. After reviewing their credentials, the Search Committee interviewed eight of the candidates and recommended four to the ASP. Following informal consultations among States Parties, Fatou Bensouda was selected as the consensus candidate on December 1, 2011, and was formally elected on December 12, 2011. Her nine-year term as Chief Prosecutor will begin in June 2012.

The creation of the Search Committee was praised for facilitating nominations based on merit. Merit-based nominations and elections are important to maintain the credibility and impartiality of the Court. The method of informally submitting nominations to a committee also helps to avoid practices such as vote trading, which threatens the credibility of both the Prosecutor and the Court. However, some criticized the Search Committee for a lack of transparency and access to information. The Search Committee was also criticized for lack of diversity because only five states were represented — one for each regional group — and there were no requirements for gender diversity.

Nominations for judicial candidates also received impartial review intended to encourage a merit-based process. The Coalition for the International Criminal Court (CICC) created an Independent Panel composed of experts in international law and criminal law to raise awareness about the nomination criteria and review the qualifications of judicial candidates. Unlike the ASP Search Committee for the Prosecutor, the Independent Panel did not endorse or oppose candidates, but rather evaluated their qualifications to determine whether they met the criteria for judges laid out in Article 36 of the Rome Statute, the founding treaty of the ICC. Article 36 specifies requirements related to candidates' moral character, past experience, and competence in relevant areas of law. Though the ASP has the authority to establish an Advisory Committee on judicial nominations under Article 36(4) (c), it has never exercised this authority and, as such, the Independent Panel is not affiliated with the ASP. In its final report, the Independent Panel found that four of the nineteen judicial candidates were not qualified because they lacked either the experience or competence in a certain area of law required under Article 36. After fifteen rounds of voting from December 12 to

16, States Parties elected six new judges, all of whom the Independent Panel found to be qualified.

The Independent Panel received similar praise as the ASP Search Committee for its role in supporting a merit-based process, but faced different challenges and criticisms. One concern was whether and how the members of the Independent Panel would measure the qualifications of the candidates. Some requirements under the Rome Statute, such as that the candidate possess high moral character, are difficult to measure, and there were concerns about the panel's ability to accurately assess such intangible qualities. Nevertheless, many found the panel members' extensive experience in international law and criminal law as well as their geographic diversity and knowledge of different legal systems sufficient to provide expertise to evaluate the criteria for judicial candidates.

As a judicial body, the independence and impartiality of the ICC are essential to its ability to deliver justice for grave violations of human rights. Electing court officials through a merit-based process safeguards the independence of the Court by alleviating perceptions of political influence that can arise from vote trading. Therefore, fair and merit-based elections serve the Court in two ways: first, the Court benefits from the leadership of the most highly-qualified candidates; and second, the Court earns respect and confidence for representatives elected through a transparent and merit-based process. The Court will reap these benefits as the mechanisms established to review the judicial and prosecutorial candidates for this election are refined in the future.

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AD HOC TRIBUNALS

LIMITING THE EXPOSURE OF PROTECTED WITNESSES IN ICTY PROCEEDINGS

On October 31, 2011, the International Criminal Tribunal for the Former Yugoslavia (ICTY) sentenced Serbian Radical Party leader Vojislav Seselj to eighteen months incarceration for contempt of court, under

Rule 77(A)(ii) of the Rules of Evidence and Procedure (Rules), for Seselj's willful disclosure of protected witness information on his website. In the second of three such contempt proceedings related to Seselj's release of protected information, the Trial Chamber found that Seselj directly and intentionally violated its protective orders. This case presents a unique challenge for witness protection at the ICTY. Rule 69(C) of the Rules requires that a testifying witness' identity be revealed to the defense prior to trial as a basic tenant of the Article 21(4)(e) right to cross-examine. Yet when an accused individual ignores the ICTY's protective orders and reveals a witness' identity, other witnesses may be reluctant to testify. In a case like *Seselj*, where fears of witness intimidation stalled the proceedings for over a year in 2010, Rule 69(C) could potentially endanger a witness. The Trial Chamber noted that "public confidence in the effectiveness of its orders and decisions is absolutely vital to the success of the work of the Tribunal," and it must ensure that future witness protection measures will effectively prevent such disclosures, as required by Article 20 of the Statute of the Tribunal.

According to Rule 75(B)(i), the Chamber may *proprio motu* institute witness protection measures to include expunging identifying information from public records, allowing testimony via image or voice altering devices, or assigning a pseudonym. Further, Rule 69 authorizes protective orders for all information used in the proceedings. In *Seselj*'s case, the Chamber issued protective orders and pseudonyms for many witnesses, and issued a general order to Seselj to refrain from disclosing such information. Seselj violated the orders of the Trial Chamber when he released identifying information and reprinted portions of statements made by witnesses in confidential submissions, which later appeared on his website and in a book that sold 10,000 copies. Seselj, representing himself, contended that the witnesses gave him permission to disclose, that exposing information about the reliability of the witnesses was necessary for his defense, and that these witnesses did not need protective measures.

The *Amicus* Prosecutor who brought the contempt charges also noted that Seselj seemed to enjoy the possibility that he would be charged with contempt, thereby bringing attention to his stated goals of derailing the proceedings and

delegitimizing the ICTY. Because of the willful nature of Seselj's disclosures and Seselj's stated intent to "create conditions for the next [disclosure]" when the contempt proceedings conclude, the Chamber considered the need for a deterrent from future disclosures. Seselj's sentence of eighteen months includes these punitive considerations.

The ICTY takes considerable steps to protect witness' physical safety through the Victims and Witnesses Section, providing security and stiff penalties for disclosure of protected information. However, such protective measures do not prevent an accused individual from disclosing information as Seselj did. Noting this dilemma and the inherent difficulty of testifying at a war crimes trial, the Parliamentary Assembly of the Council of Europe drafted a report on

witness protection in the Balkans in June 2010. The report highlighted the plight of witnesses in the former Yugoslavia who have been murdered, threatened, and had their identities revealed by parties intent on obstructing justice. Many witnesses are reluctant to testify, believing they will be marked as traitors for doing so. In light of this, the Assembly decried the ICTY's current practice of disclosing the identity of anonymous witnesses to the defense prior to the trial. In cases where revealing the identity of a witness is disproportionate to the risk of harm to that person, the Assembly encouraged the ICTY to consider amending the Rules to allow witness anonymity to the defense. On method used by the European Court of Human Rights is to secure a "special advocate," functioning independently of the parties, to analyze

the evidence, and act as an intermediary between the witness and the defense.

Whatever measures of additional witness protection the ICTY takes to address such situations in the future, it faces the daunting task of balancing such a measure against the Article 21(4)(e) rights of the accused "to examine, or have examined, the witnesses against him." In Seselj's case, the law binding those present in court from disclosing information did not stop him. Given the global audience for Internet disclosures, Seselj's actions likely present an area of concern to the tribunal. It remains to be seen whether the ICTY can or will institute a process for allowing anonymous witnesses to testify without infringing on the rights of the accused.

JUDGMENT SUMMARIES: INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

THE PROSECUTOR V. BIZIMUNGU, ET AL., TRIAL JUDGMENT, CASE NO. ICTR-99-50-T

On September 30, 2011, Trial Chamber II of the International Criminal Tribunal for Rwanda (ICTR) issued its judgment in the case against Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicomupaka, and Prosper Mugiraneza, commonly referred to as the "Government II" case. Each of the four accused held positions in the government of Juvenal Habyarimana and, following his death, in the interim government that ruled Rwanda between April and July 1994. During the events of the 1994 genocide, Bizimungu served as Minister of Health, Mugenzi served as Minister of Commerce, Bicomupaka served as Minister of Foreign Affairs, and Mugiraneza served as Minister of Civil Service. Each was charged with nine counts, namely: genocide; conspiracy to commit genocide; complicity in genocide; direct and public incitement to commit genocide; murder as a crime against humanity; extermination as a crime against humanity; rape as a crime against humanity; the war crime of violence to life, health and physical or mental well-being of persons; and outrages upon personal dignity as a war crime. The Chamber found Mugenzi and Mugiraneza guilty of conspiring to commit genocide and direct

and public incitement to commit genocide, but acquitted the two men of all other charges. Mugenzi and Mugiraneza were both sentenced to thirty years in prison. The Chamber acquitted Bizimungu and Bicomupaka of all nine of the charges based on a lack of sufficient evidence, and ordered their immediate release.

Before turning to the allegations against the four accused, the Trial Chamber began its judgment by addressing a number of preliminary challenges raised by the Defense. Among these challenges were claims submitted by Bicomupaka, Bizimungu, and Mugenzi that their right to be tried without undue delay had been violated. The trial was among the longest at the ICTR, with more than twelve years passing between the arrest of the four suspects and the delivery of the verdict. With respect to Bicomupaka's challenge, the Chamber held that it had already dealt with the issue in dismissing a similar motion brought by the Bicomupaka Defense seeking a stay of proceedings based on a claim that the accused's right to a speedy trial had been violated. Similarly, the Chamber held that it would not reconsider the claims of Bizimungu and Mugenzi that their right to trial without undue delay had been violated by the amount of time that passed between the arrest of the accused and the start of trial, as the Chamber had dismissed motions raising a similar claim brought by each of these accused prior to the commencement of trial. Interestingly, the Chamber noted that it may reconsider

previous rulings based, *inter alia*, on a new fact or change in circumstance, but it held that the fact that an additional year had passed between its rulings on the initial Bizimungu and Mugenzi challenges relating to undue pre-trial delay and the actual commencement of trial did not constitute a new fact or change in circumstance warranting reconsideration. Thus, the only claim relating to undue delay considered by the Trial Chamber in its judgment was a claim brought by the Mugenzi Defense alleging that his right to a speedy trial was violated by the length of the trial itself. The trial commenced on November 6, 2003 and concluded on December 5, 2008, with the Chamber sitting in session for 399 days. Mugenzi argued that the length of proceedings was a result of "the Tribunal's failure to prioritise this case, as well as numerous adjournments and scheduling failures that delayed the proceedings." However, while the Chamber recognized that the proceedings had been lengthy and that there were "concerns that the conduct of the Tribunal, and the increased workload of the presiding judges more specifically, has contributed to this delay," a majority of the Chamber rejected Mugenzi's claim, finding that the length of the proceedings could primarily be attributed to size and complexity of the case. Judge Emile Francis Short dissented from this finding, holding that the fact that the judgment was not delivered until more than three years after the close of evidence in the case was sufficient to constitute a violation of the

accused's right to trial without undue delay. Judge Short would have taken five years off the sentences given to Mugenzi and Mugiraneza in compensation for the violation of their rights and held further hearings to determine the appropriate remedy for Bizimungu and Bicomumpaka.

Turning to the allegations against the accused, the Prosecution argued that each of the accused was responsible under both Article 6(1) (direct responsibility) and Article 6(3) (superior responsibility) of the ICTR Statute based on specific events that allegedly supported the charges. In addition, the Prosecutor argued in its closing submissions that each of the four accused bore superior responsibility "for the genocide as a whole," claiming that that the government ministers were "criminally liable for the acts perpetrated by a range of subordinates, including: the staff of their respective ministries, the [*Forces Armées Rwandaises*], the *gendarmerie*, soldiers, prefects, prefects' subordinates, *bourgmestres*, communal police, *conseillers*, local authorities, civic leaders, militias, *Interahamwe*, 'the killers', civilians and 'the Hutu population throughout Rwanda.'" Notably, the Tribunal has previously held that "general statements of the situation in Rwanda in April 1994 may be illustrative as to the background of the case, but they are not suited to prove the individual guilt of the Accused." Nevertheless, the Prosecutor asked the Chamber to "break new ground" by finding that an accused's "charismatic power over [a] population based on the history and sociological make-up of that community" can satisfy the requirement of a superior-subordinate relationship. Specifically, in this case, the Prosecutor argued that the Chamber should consider "the manner in which [the Accused] were perceived by society as Ministers, and the power of influence they commanded" in determining whether they had a superior relationship over the various groups of persons responsible for carrying out genocidal acts throughout the country. However, the Trial Chamber rejected this allegation, noting that the Prosecution did not "link its theory to any specific, proven events in this case," but rather presented "vague arguments" and evidence that was "general in nature," which the Chamber determined to be "wholly insufficient to establish the rigorous requirements necessary to impose

criminal responsibility pursuant to Article 6 (3) of the Statute."

In terms of the charges upon which Mugenzi and Mugiraneza were convicted, both related to the role of the two accused in the removal of the Tutsi prefect of Butare prefecture, Jean-Baptiste Habyarimana, on April 17, 1994, and his replacement two days later. First, the Chamber determined that, at least as early as April 17, a joint criminal enterprise existed among several members of the Rwandan interim government, including Mugenzi, Mugiraneza, and Rwandan President Théodore Sindikubwabo, the aim of which was to kill Tutsis in Butare. In furtherance of this plan, the members of the enterprise agreed to remove Habyarimana from his post "in order to undermine the real and symbolic resistance that he posed to the killing of Tutsis in Butare." According to the Chamber, the decision to remove Habyarimana amounted to an agreement to undertake a preparatory act that, while preceding the physical perpetration of genocide, was "clearly aimed at" furthering genocide. Furthermore, the Chamber determined that both Mugenzi and Mugiraneza "possessed genocidal intent when agreeing to remove Habyarimana." Thus, the Chamber held, Mugenzi and Mugiraneza were guilty of conspiracy to commit genocide. Second, the Chamber determined that, two days after the removal of Habyarimana, President Sindikubwabo delivered an inflammatory speech at the ceremony inaugurating Habyarimana's replacement that amounted to direct and public incitement to genocide. Specifically, the Chamber determined that Sindikubwabo's speech "was a direct call for those in Butare to engage in the killing of Tutsi civilians," delivered to a public audience, and that he made his remarks with genocidal intent. The Chamber then concluded that the speech was made "in furtherance of the criminal purpose" of the joint criminal enterprise to kill Tutsis in Butare. The Chamber found that Mugenzi and Mugiraneza shared President Sindikubwabo's genocidal intent, as demonstrated by their involvement in the decision to remove Habyarimana and their presence at the inaugural ceremony on April 19. Finally, the Chamber concluded that Mugenzi and Mugiraneza "substantially and significantly contributed" to Sindikubwabo's incitement by "creat[ing] a scenario that

would allow for Sindikubwabo to publicly and ceremoniously air his inflammatory speech," fostering a "context that would ensure that Sindikubwabo's inciting message would be understood," and providing "significant and substantial moral encouragement to Sindikubwabo as he incited the killing of Tutsis." Therefore, the Chamber concluded that Mugenzi and Mugiraneza were guilty of direct and public incitement to commit genocide based on their participation in a joint criminal enterprise. Based on these convictions, and taking into account the gravity of the crimes and aggravating and mitigating circumstances, the Trial Chamber sentenced Mugenzi and Mugiraneza to thirty years in prison.

Sofia Vivero, 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.

YUSSUF MUNYAKAZI V. THE PROSECUTOR, APPEALS JUDGMENT, CASE NO. ICTR-97-36A-A

On September 28, 2011, the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) issued its judgment in the case against Yussuf Munyakazi. The Trial Chamber convicted Munyakazi for committing genocide and extermination as a crime against humanity based on his participation in attacks on the parishes of Shangi and Mibilizi in April 1994, which resulted in the deaths of more than 5,000 Tutsi civilians. He was sentenced to a single term of twenty-five years of imprisonment. In its opinion, the Appeals Chamber dismissed each of Munyakazi's eight grounds of appeal, as well as the Prosecutor's three grounds of appeal, and confirmed the Trial Chamber's judgment and sentence.

As a general matter, questions pertaining to the assessment of evidence played a significant part in the Chamber's judgment. When addressing alleged errors in the assessment of evidence, the Appeals Chamber stressed that the Trial Chamber is endowed with broad discretion to evaluate inconsistencies arising within or among witnesses' testimonies and to consider whether the evidence is credible taken as a whole. Furthermore, when evaluating inconsistent accounts, the Trial Chamber

retains discretion to express a preference for, and rely on, what it determines to be the most credible testimony, or piece of testimony. The Appeals Chamber also recalled that, consistent with its prior jurisprudence, the Trial Chamber may find that one witness's testimony has been satisfactorily corroborated by the testimony of a second witness, even where some discrepancies exist between the two testimonies. Thus, for instance, the Appeals Chamber found no error in the Trial Chamber's decision to discount minor variances between the testimony of two witnesses, such as the gender of certain militia members, noting that such discrepancies are not unexpected in the given context, particularly due to the witnesses' varying vantage points. The fact that the testimonies were consistent on key details, such as the date and timeframe of the attack, Munyakazi's participation, and the general tenor of the events, was deemed sufficient to support the Chamber's finding that the witnesses were credible.

Among Munyakazi's unsuccessful grounds of appeal was a claim that the Trial Chamber erred in its assessment of his alibi. Specifically, Munyakazi argued that: (i) the Chamber inappropriately considered the fact that Munyakazi did not provide notice of his intent to rely on an alibi in assessing the reliability of the alibi; and (ii) the Chamber improperly reversed the burden of proof by faulting the Defense for adducing no evidence to support the alibi other than the testimony of the accused, which the Chamber found to be unreliable. As to the first issue, the Appeals Chamber first recalled that Rule 67(A)(ii) (a) of the ICTR's Rules of Evidence and Procedure requires the Defense to notify the Prosecution before the commencement of trial of its intent to enter a defense of alibi. Furthermore, the Appeals Chamber recalled its earlier jurisprudence in which it held that the Trial Chamber may consider the circumstances in which an alibi was presented in weighing its credibility. Thus, the Appeals Chamber found no error in the Trial Chamber's holding that, while the Defense's failure to provide advance notice of its alibi was not "dispositive," the lack of notice, and indeed the fact that the alibi was not presented until Munyakazi took the stand as the final witness for the Defense, affected the credibility of the alibi. On the second issue, the Appeals Chamber began by reiterating that the accused does not bear the burden of

proving an alibi beyond a reasonable doubt; rather, when the defense of alibi is raised, the Prosecution must establish the allegations against the accused beyond a reasonable doubt despite the alibi. Nevertheless, the Appeals Chamber noted that the Trial Chamber has the right to require corroboration of any evidence, and held that, in this case, "it was not unreasonable for the Trial Chamber to question the credibility of Munyakazi's alibi in the absence of corroboration given the inherent self-interest of his testimony and the introduction of the alibi at the close of the case."

The Defense also challenged the validity of the Trial Chamber's finding that Munyakazi was responsible for the attacks at the Shangi and Mibilzi parishes based on his role as a "leader of the attacks who exercised *de facto* authority over the Bugarama *Interahamwe*" that physically carried out the attacks. In particular, Munyakazi challenged the Trial Chamber's finding that he had sufficient notice that the Prosecution was alleging he held a leadership role during the attacks. In reviewing the indictment, the Appeals Chamber noted that paragraph 1 alleged that, during the entire period covered by the indictment, Munyakazi was "a leader with *de facto* authority over the Bugarama MRND *Interahamwe* militia," and that paragraphs 13 and 14 Munyakazi, "with the Bugarama *Interahamwe*, attacked and killed" Tutsi civilians at the two parishes. However, there was no specific allegation supporting the Trial Chamber's ultimate finding that Munyakazi committed the crimes at Shangi and Mibilizi parishes "[o]n the basis of his leadership position at the crime sites." Nevertheless, the Appeals Chamber determined that the "more general allegations" in paragraphs 13 and 14 must be read "in light of paragraph 1," which alleges Munyakazi's role as the leader over the *Interahamwe*, and that therefore, the indictment provided the accused with sufficient notice that he could be held responsible for the attacks on the parishes based on his leadership role over the militia members that carried out the attacks. Munyakazi also challenged the Trial Chamber's assessment of the evidence presented in support of the Prosecution's claim that Munyakazi acted as a leader over those who carried out the attacks on the Shangi and Mibilizi parishes, but the Appeals Chamber dismissed this challenge, relying on the principles described above

relating to the Trial Chamber's discretion in assessing evidence.

Yet another challenge brought by Munyakazi was that the Trial Chamber erred in finding that he acted with the requisite intent to convict him of genocide and the crime against humanity of extermination. According to Munyakazi, the Chamber had no legal or factual basis for its findings of intent, and the Chamber erred by failing to find that Munyakazi had formed the intent to commit genocide prior to the occurrence of the attacks. In its judgment, the Trial Chamber recognized that it "had very little direct evidence of Munyakazi's intent" with regard to the acts carried out at the parishes and "no evidence of his personal views regarding Tutsis." However, citing to Munyakazi's statement to the Tutsi refugees at Mibilizi parish that they "were going to pay" for killing the head of state, and stressing the "nature and scope of the crimes" committed at both parishes, the Trial Chamber inferred that Munyakazi acted with the requisite genocidal intent and with knowledge that the attacks formed part of a widespread and systematic attack on Tutsi civilians. The Appeals Chamber found no error in the Trial Chamber's approach, noting that an accused's genocidal intent "may be inferred from circumstantial evidence, including his active participation in an attack." In fact, despite Munyakazi's argument to the contrary, the Appeals Chamber reiterated earlier jurisprudence holding that "[t]he inquiry is not whether the specific intent was formed prior to the commission of the acts, but whether at the moment of commission the perpetrators possessed the necessary intent."

Lastly, the Appeals Chamber dismissed Munyakazi's challenge to his sentence, upholding the Trial Chamber's finding that the abuse of a position of influence and authority in a given case may be counted as an aggravating factor in sentencing and deferring to the Trial Chamber's broad discretion to dismiss or to take into account mitigating circumstances raised by the Defense. Furthermore, the Appeals Chamber held that the fact that Trial Chamber did not expressly discuss some mitigating circumstances raised by the Defense, namely that Munyakazi provided assistance to several Tutsi friends during the genocide, is not relevant because a Trial Chamber is not required to expressly address every piece of presented evidence,

and moreover possesses broad discretion to determine the weight of such evidence. The Appeals Chamber also rejected the Prosecution's request that the sentence be increased to life imprisonment, and thus affirmed the Trial Chamber's sentence of twenty-five years imprisonment.

Interestingly, Judge Liu attached a separate opinion to the judgment in which he discusses the Trial Chamber's holding that Munyakazi's role in the attacks on the two parishes amounted to "commission" of the charged crimes under Article 6(1) of the ICTR Statute, a holding that was not challenged on appeal. As Judge Liu recognized, the ICTR first adopted an expanded interpretation of "commission" as a mode of liability in the *Gacumbitsi* case, in which the Appeals Chamber held that, in the context of genocide, a person need not physically perpetrate the *actus reus* or participate in a joint criminal enterprise aimed at carrying out genocide to be held responsible for "committing" genocide, but rather may be found to have "committed" the crime by performing other acts, such as directing or supervising killings. This expanded understanding of "committing" was later applied to the crime against humanity of extermination. While Judge Liu acknowledged that this interpretation could now be considered settled jurisprudence of the Tribunal, he nevertheless wrote to express concern that, by subsuming and conflating the various modes of individual criminal responsibility outlined in Article 6(1) of the Statute — namely, committing, planning, ordering, instigating, and otherwise aiding and abetting — the expanded definition "creates considerable ambiguity as to the scope of a convicted person's criminal responsibility," which in turn may "run contrary to basic principles of fairness." Judge Liu also noted that the broad interpretation of "committing" "uncannily resembles joint criminal enterprise, without requiring the satisfaction of [the latter's] more stringent pleading criteria."

Andra Nicolescu, 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.

**EPHREM SETAKO V. THE PROSECUTOR,
APPEALS JUDGMENT, CASE NO.
ICTR-04-81-A**

On September 28, 2011 the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) issued its judgment in the case against Ephrem Setako, who served as head of the legal affairs division of the Rwandan Ministry of Defence during the 1994 genocide. At trial, all of the charges against Setako related to his alleged role in ordering the killing of Tutsis at the Mukamira military camp on two separate occasions, namely on April 25, 1994 and on May 11, 1994. The Trial Chamber of the ICTR had sentenced Setako to twenty-five years of imprisonment upon convictions for genocide in relation to both sets of killings; extermination as a crime against humanity in relation to the April 25 killings; and violence to life, health and physical or mental well-being of persons (murder) as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the April 25 killings. On appeal, the Appeals Chamber affirmed the Trial Chamber's judgment, and convicted Setako of an additional count of murder in violation of Article 3 of the Geneva Conventions based on the May 11 killings. Despite the additional conviction, however, the Chamber did not increase the original twenty-five year sentence imposed on Setako.

Setako raised several unsuccessful grounds of appeal, including a claim that he had been denied a right to a fair trial. Specifically, Setako challenged the fact that the Trial Chamber granted the Prosecutor leave to amend the indictment more than three years after the initial indictment had been issued, claiming that the amended indictment significantly expanded the case against the accused and thus deprived him of his rights to be tried without undue delay and to have adequate time and facilities to prepare his defense. In response, the Appeals Chamber began by recalling that the Trial Chamber enjoys considerable discretion in determining the conduct of trial proceedings, which includes determining whether to grant the Prosecutor leave to amend an indictment. While the Trial Chamber must safeguard the accused's right to a fair and expeditious trial, a discretionary decision of the Chamber will not be overturned on appeal unless the challenging party demonstrates

a discernible error resulting in prejudice to that party. Here, the Appeals Chamber held that Setako failed to make such a demonstration, particularly in light of the fact that the Trial Chamber did not grant the Prosecution's request for leave to amend the indictment in its entirety. Indeed, the Trial Chamber rejected several proposed amendments on the ground that they would give the Prosecution an "unfair tactical advantage" given the late stage of the proceedings. Instead, the Trial Chamber only permitted those amendments that would *enhance* the fairness of the trial, such as those aimed at "better articulating [the Prosecution's] theories of criminal responsibility, removing any factual allegations it no longer wishes to pursue, and correcting or supplementing with additional detail any of the existing factual allegations."

Another of Setako's unsuccessful grounds of appeal was a claim that the Trial Chamber erred in finding two of the Prosecution's witnesses, who were "insider witnesses," credible. Setako raised a number of challenges to the credibility of the witnesses, including the fact that, prior to being investigated by ICTR authorities, the witnesses had both provided confessions to Rwandan national authorities in which they made no mention of the crimes in which they later implicated Setako. Setako argued that the Trial Chamber failed to adequately explain these omissions, citing to Rwandan Organic Law 8/96, which requires that a person making a confession to Rwandan judicial authorities provide information about *all* of the suspect's crimes and co-perpetrators. The Appeals Chamber began its assessment of Setako's claim by noting that the credibility of a witness will depend on a variety of factors and must be evaluated in the context of all of the evidence on the record. In the present case, the Appeals Chamber determined that the Trial Chamber "reasonably considered" all of the relevant factors, including the fact that neither of the two witnesses had been charged by Rwandan authorities with the particular crimes in which they later implicated Setako, making it unlikely that they would voluntarily inform those authorities that they had in fact participated in the crimes. With regard to Rwandan Organic Law 8/96, the Appeals Chamber noted that Setako had not raised this law before the Trial Chamber, but rather cited to it for the first time on appeal, and thus the Defense could not fault the Trial Chamber for

failing to address the law in its assessment of the witnesses' credibility.

One ground of appeal raised by Setako that was successful involved a challenge to the Trial Chamber's decision to take judicial notice of a certain fact determined by the Trial Chamber in the *Bagosora, et al.* trial, a case that was on appeal at the time of the *Setako* Trial Chamber's judgment. Pursuant to Rule 94(B) of the ICTR's Rules of Procedure and Evidence, a Trial Chamber may "decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings." However, Rule 94(B) expressly requires that the Trial Chamber take judicial notice of a fact or evidence from other proceedings only "after hearing the parties." Furthermore, as established in prior jurisprudence of the ICTR, the reference to "adjudicated" facts in Rule 94(B) means that the relevant fact must have been determined in a final judgment. Here, the Appeals Chamber determined that the Trial Chamber erred by judicially noticing a fact from the *Bagosora, et al.* Trial Chamber judgment without hearing from the parties and while the judgment was pending appeal. Nevertheless, the Appeals Chamber determined that the fact that was judicially noticed was otherwise supported by documentary evidence entered into the record during Setako's trial, and thus did not invalidate the conclusions of the Trial Chamber.

Among the grounds of appeal raised by the Prosecutor was a challenge to the Trial Chamber's failure to convict Setako of the war crime of murder in relation to a number of killings that occurred on May 11, 1994 at the Mukamira military camp. Notably, the Trial Chamber had determined that Setako was responsible for these killings in support of its finding that Setako was guilty of genocide, but the Chamber made no finding with respect to the Prosecution's allegation that these killings also amounted to murder as

a war crime. After reiterating its earlier dismissal of Setako's challenge to the Trial Chamber's finding that he ordered the May 11 killings, and determining that the victims of the killings could not be considered to have been taking an active part in hostilities at the time of their murder, the Appeals Chamber, by majority, held that Setako was in fact guilty of murder as a war crime based on the incident. While Judge Pocar agreed with the majority that the Trial Chamber erred by failing to convict Setako of the charge, he nevertheless dissented from the majority's holding on the ground that he does not believe that the Appeals Chamber has the authority to enter a new conviction on appeal. As he has argued in dissenting opinions issued in previous cases, Judge Pocar stressed that Article 24(2) of the ICTR Statute requires that the Chamber apply fundamental principles of international human rights law, including those found in the International Covenant on Civil and Political Rights of 1966 (ICCPR). Because Article 14(5) of the ICCPR states that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law," Judge Pocar argued that an accused must have a right to appeal any conviction entered by the Tribunal, a right that is denied when the Appeals Chamber enters a new conviction on appeal. In Judge Pocar's opinion, the Appeals Chamber should have either found that the Trial Chamber erred in relation to the charge of murder as a war crime and remitted the case to the Trial Chamber to rectify the error, or simply entered its finding regarding the Trial Chamber's error in order to correct the record, but decline to remit the case to the Trial Chamber in light of efficiency concerns. The latter approach might be particularly warranted in the present case, in Judge Pocar's opinion, given that the Appeals Chamber determined that the additional conviction did not affect the accused's sentence.

The Prosecution also contended on appeal that the Trial Chamber erred when it did not address the defendant's responsibility for the charged crimes under both Article 6(1) (direct responsibility) and Article 6(3) (superior responsibility) of the Statute. Specifically, the Trial Chamber determined that, because it found that Setako was guilty under Article 6(1) of the Statute, it did not need to address Setako's liability under Article 6(3), holding that Setako could not be convicted under both provisions based on the same set of facts. While the Appeals Chamber affirmed that the Trial Chamber could not enter separate convictions against Setako on the basis of more than one theory of liability, it held that the Trial Chamber should have considered whether Setako bore responsibility under Article 6(3) for purposes of sentencing. The Appeals Chamber went on to make the determination itself and held that the Prosecution had failed to establish beyond a reasonable doubt that Setako exercised effective control over the individuals who carried out the killings at the Mukamira military camp, and thus held that he did not bear superior responsibility for the charged crimes.

Finally, the Appeals Chamber addressed the appropriateness of the Trial Chamber's sentence, holding that although the Appeals Chamber had entered an additional conviction against Setako for murder as a war crime, this finding did not warrant an increase in Setako's sentence because the Trial Chamber had "decided on Setako's sentence based on a full picture of the proven material allegations against him."

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NO REFUGE: THE QUANDARY OF RESETTLING SUSPECTS ACQUITTED BY THE ICTR

The International Criminal Tribunal for Rwanda (ICTR) rendered judgment in the high profile "Government II" case on September 30, 2011, and with it brought a persistently pressing matter back to the fore: what should the international

community do with persons acquitted by the ICTR? In "Government II," the ICTR tried four former ministers of the interim government established in Rwanda after the assassination of President Juvénal Habyarimana. Two of the four were acquitted for lack of sufficient proof of involvement. Returning to Rwanda is an unlikely option for these men because of their high

profiles and the possibility of persecution, and they will have to go through the difficult process of seeking resettlement in another country. The ICTR has acquitted ten accused persons, and only five have managed to find a host country. André Ntagerura has unsuccessfully sought a host country since his acquittal in 2004. The plight of Ntagerura and others

demonstrates the need for the international community to put its weight behind the tribunal's verdicts and treat the resettlement of persons acquitted by international tribunals as a contemporaneous duty to the establishment of the *ad hoc* tribunals.

Outgoing ICTR President Judge Khalida Rachid Khan sees the resettlement of persons acquitted by the tribunal as a "fundamental expression of the Rule of Law," guaranteeing acquitted individuals the right to live, including full enjoyment of education, employment, and family. Judge Khan has repeatedly implored the UN Security Council to aid in finding a suitable solution to the problem of resettlement. In a 2008 report highlighting relocation challenges, the ICTR noted that the effectiveness of *ad hoc* tribunals will be seriously challenged if member states do not demonstrate support in such efforts.

Public response in Rwanda to the acquittal of high profile individuals "convicted" in the court of public opinion is typically not positive. Thus, acquitted persons reside in temporary safe houses in Arusha, Tanzania. Many UN member states have the ability to provide a safe alternative, and several have, but the majority show reluctance to work with the ICTR. This is due, in part, to the lack of any formal mechanism for such relocations. Article 28 of the ICTR Statute governs cooperation with member states, but focuses primarily on the identification, testimony, service, arrest, detention, and transfer of suspects to the ICTR, and does not mandate cooperation with requests for the resettlement of acquitted persons. The ICTR has thus relied on its registrar to coordinate these relocations, with mixed success after protracted bilateral negotiations. So far France has accepted two acquitted persons, while Belgium, Switzerland, and Italy have each accepted one.

In the past, the United Nations High Commissioner on Refugees (UNHCR) has expressed reservations about granting refugee status to acquitted persons, pointing to Article 1(F) of the 1951 Refugee Convention that prohibits refugee status if "there are serious reasons for considering that...[one] has committed a crime against peace, a war crime, or a crime against humanity...." However, the UNHCR notes that because acquitted persons fear persecution in Rwanda as a result of their acquittal, they *require* refugee status. Furthermore, an acquittal by an *ad hoc* tribunal may

effectively remove the "serious reasons for concern" mentioned in Article 1(F). Yet refugee or not, the problem of finding a country to accept the acquitted persons still remains.

In June 2011, outgoing ICTR President Khan, with the support of the UNHCR, appealed to the UN Security Council to form a solution. The Security Council responded positively to President Khan's request, adopting Resolution 2029 on December 21, 2011, requesting that member states "cooperate with and render all necessary assistance to the International Tribunal in the relocation of acquitted persons." Under Article 25 of the Charter of the United Nations, member states must "agree to accept and carry out" decisions of the Security Council, and such decisions are binding when made under Chapter VII of the Charter, as was Resolution 2029. It is now up to the member states and the ICTR to build a formal mechanism. Five acquitted persons remain in Arusha under the protection of the ICTR, and unless a solution appears soon, the Residual Mechanism will inherit the challenge of finding host countries when it takes over for the ICTR in July 2012.

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INTERNATIONALIZED TRIBUNALS

PRISONERS OF THE SPECIAL COURT FOR SIERRA LEONE ALLEGE MISTREATMENT IN RWANDA PRISON

Despite complaints of mistreatment from the prisoners themselves, the Special Court for Sierra Leone (SCSL) recently found that the eight men currently serving sentences in Rwanda for crimes against humanity are being treated fairly and according to international standards. The SCSL was established in July 2002 to adjudicate war crimes and crimes against humanity committed during the civil war in Sierra Leone. The Appeal Chamber sentenced Allieu Kondewa and Moinina Fofana in 2008 and RUF leaders Issa Hassan Sesay, Morris Kallon, and Augustine Gbao in 2009, to prison sentences in Rwanda. Following customary international standards and complaint review, Rule 39 of the Rules of Detention for the SCSL entitles detainees to medical services, adequate food, family visits, and

the right to complain about conditions to the Chief of Detention and the Registrar of the SCSL. Although the prisoners have alleged that they did not receive proper nutrition or medical attention, a committee from the SCSL did not find sufficient evidence to warrant transfer to another country.

The SCSL does not have the capacity to house detainees after they have been convicted, and has therefore made agreements with Finland, Sweden, the United Kingdom, and Rwanda for prisoners to serve their sentences in those countries. Having been convicted by the SCSL, the prisoners are subject to the SCSL Rules of Detention while they serve their sentences in the host country. The Amended Agreement between the SCSL and the Government of Rwanda states that the "conditions of imprisonment shall be consistent with the widely accepted international standards governing treatment of prisoners," and the International Committee of the Red Cross (ICRC) will inspect the conditions of detention to ensure that standards are being met. International standards require that the dignity of personhood of all detainees be respected and that all basic needs, such as health, security and privacy are met in a reasonable fashion. These needs are judged in part by medical officers who advise the Chief of Detention.

Under the Practice Direction for Designation of State for Enforcement of Sentence, once the SCSL has finalized a sentence, the President of the Court decides where the convict is sent. Rwanda's commitment to take convicted persons from the SCSL became part of Rwandan law, which requires that the detention centers maintain a standard comparable to the requirements of the SCSL. However, prison conditions throughout Rwanda have historically been criticized, due to concerns of overcrowding, poor medical care, and physical. Because Rwandan law requires less stringent prison conditions, there is concern that the prisoners of the SCSL in Rwanda are being denied their rights to adequate standards of detention under the SCSL Rules of Detention and customary international law. However, the Commissioner General of Rwandan Correctional Services stated that the SCSL prisoners are given special treatment in Rwandan prisons and after a committee from the SCSL visited the prison in Rwanda and reported back to the court, the SCSL stated that the prisoners

were being treated in accordance with international standards.

Based on the report issued by the SCSL in January 2012, it seems unlikely that the prisoners will be removed to another country. Given the difference in prison conditions between Rwanda and prisons in Finland, Sweden, and the United Kingdom, it is understandable that the prisoners would want to be transferred to one of the European countries known for better health care and more humane prison conditions. Furthermore, the prisoners' wives could seek asylum in the European host country under European asylum laws to be near their husbands. While the SCSL prisoners' complaints may put a spotlight on the Rwandan prison system, allegations of overcrowding and human rights abuses have long plagued the Rwandan prison system. However, with the SCSL report stating no findings of abuse, it is unlikely that the prisoners will be moved to Europe.

Prisoners' rights are an important aspect of international justice because the humane treatment of detainees and convicts legitimizes an international court's ability to adjudicate human rights abuses. However, determining what constitutes fair treatment is challenging when prison conditions among different countries vary widely. As the SCSL has agreements with both European and African nations to host prisoners, prisoners understandably prefer sentences in European countries with better prison facilities. However, there is a limited amount the SCSL can do without clear evidence of prisoner abuse and violations of international standards.

TRIALS IN ABSENTIA IN THE SPECIAL TRIBUNAL FOR LEBANON

For the first time since the Nuremburg trial *in absentia* of Martin Bormann in 1946, an internationalized court, namely the Special Tribunal for Lebanon (STL), has initiated a trial completely *in absentia*. In the case of *The Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, and Assad Hassan Sabra*, the pre-trial court seized the trial chamber and determined that a trial *in*

absentia is appropriate at this time. The defendants were indicted in June 2011, but as of February 2012, none of the four accused of assassinating former Lebanese Prime Minister Rafik Hariri had appeared before the court. Because trials *in absentia* are a controversial concept, as the STL begins its proceedings, it will have to balance the need for efficient justice with the rights of the accused for a fair trial under the International Covenant on Civil and Political Rights (ICCPR), Article 14(3)(d).

Trials *in absentia* are controversial because they seem to violate the due process rights guaranteed in Article 14(3)(d) of the International Covenant on Civil and Political Rights, which ensures the right of a defendant "to be tried in his presence." Despite this discord with the ICCPR, many countries, such as the United States, France and Italy, allow for partial trials *in absentia* if the accused is aware of and present for the initial hearing of the trial. The validity of a trial *in absentia* rests on the guarantee that the defendant has the same rights during the trial as if he were present, and that he is made aware of the initial proceedings and indictment. The European Court of Human Rights allows trials *in absentia* provided that a retrial is permitted if the defendant chooses, except if the defendant waived his right to be present and had his chosen counsel appear on his behalf.

Unlike in the United States, the STL can hold trials completely *in absentia* under Article 22 of the Statute of the STL and Rules of Procedure and Evidence 105 and 106. A trial *in absentia* shall be conducted in the STL if the defendant has waived his right to be present, has not been handed over to the STL, or has absconded and the court has taken all "reasonable precautions" such as coordinating with Lebanese authorities. Rule 105 *bis* (A) allows the pre-trial court to initiate a trial *in absentia* if the defendants have not communicated with the court thirty days after the indictment.

The STL issued the indictment in *Prosecutor v. Salim Jamil Ayyash, et al.* on June 28, 2011. Despite arrest warrants

being issued on July 8, 2011, the defendants failed to appear before the court. In September, the pre-trial court initiated proceedings to seize the trial court to determine if a trial *in absentia* could proceed. However, the prosecution filed a motion that was granted requesting a delay in the proceedings because all reasonable measures to secure the defendants under Rule 106 have not been completed. The prosecution cited a lack of cooperation between the trial court and the Lebanese authorities who could do more to search for and arrest the defendants. However, on February 1, 2012, the Trial Chamber ordered the commencement of a trial *in absentia* against the four accused to start this year. If the four accused are found guilty, they may accept the verdict of the trial *in absentia*, accept the verdict and request a hearing on some aspect of the case, or request a new trial.

While in theory an apolitical tribunal, the STL is in a tenuous position given the current political situation in Lebanon. As the three-year mandate of the tribunal draws to a close and Hezbollah gains political support throughout the country, in part by promising to defund the STL, issuing a ruling to authorize a trial *in absentia* may add fuel to the fire and create increased resentment against the tribunal. Furthermore, the validity of a trial *in absentia* must be questioned. While the indictments of the four accused have been published throughout Lebanon and the world, it is possible that the suspects are so well hidden that they have not heard of the indictments, in which case commencing with a trial against them could violate their rights under the ICCPR. On the other hand, if the TIMES article is true, the rights of the victims to have their day in court against the accused should not be denied simply because the controlling political party in Lebanon wishes to avoid it. In the end, effective international justice should rise above the political concerns of a state.

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