

UPDATES FROM THE INTERNATIONAL CRIMINAL COURTS

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

GEORGES ANDERSON NDERUBUMWE RUTAGANDA V. THE PROSECUTOR, CASE NO. ICTR-96-3-A

On May 26, 2003, the ICTR Appeals Chamber rendered its judgement in *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*. In December 1999, Rutaganda was found guilty by the Trial Chamber of participating in crimes committed during April to June 1994 in the *préfectures* of Kigali and Gitarama involving his distribution of weapons to members of the *Interahamwe*, his direction of men under his control to detain and then kill ten Tutsis, his direction and participation in massacres at the École Technique Officielle (ETO school) and the Nyanza gravel pit, and his killing of Emmanuel Kayitare. For these acts he was convicted of genocide and crimes against humanity (murder and extermination) and sentenced by the Trial Chamber to a single term of life imprisonment. Rutaganda appealed against all his convictions and the Prosecution appealed Rutaganda's acquittal for murder as a violation of common Article 3 to the Geneva Conventions. The Appeals Chamber set aside Rutaganda's conviction for murder as crime against humanity for the killing of Emmanuel Kayitare, reversed his acquittal for two counts of murder as violation of Article 3 common to the Geneva Conventions, and affirmed the single sentence of life imprisonment.

In discussing the standard for appellate review, the Appeals Chamber affirmed that an appeal was "not an opportunity for the parties to reargue their case," but must be based on "an error on a question of law invalidating the decision" or on "an error of fact that has occasioned a miscarriage of justice." Regarding an error of law, the party raising the allegation must identify the alleged error, present support for the contention, and explain how the error invalidates the decision. Regarding errors of fact, the Appeals Chamber must show a high level of deference to the Trial Chamber's findings. Only when the Trial Chamber's findings of fact "could not have been accepted by any reasonable person," or when the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own findings.

When this requirement is met, the party arguing that there has been a miscarriage of justice must further establish "that the error was critical to the verdict reached by the Trial Chamber" and that "a grossly unfair outcome has resulted from the error."

The Appeals Chamber assessed and rejected Rutaganda's contention that his right to a fair trial was violated due to bias on the part of the Trial Chamber in the treatment of his testimony and during the examination and cross-examination of witnesses. It also rejected Rutaganda's argument that the Trial Chamber had erred in finding that, in accordance with the test developed in the *Akayesu* Trial Judgment, specific intent for genocide could be inferred in part from the "general context of the perpetration of acts by others." In upholding the *Akayesu* approach, the Appeals Chamber noted that it did "not imply that guilt of an accused maybe inferred only from his affiliation with a 'guilty organisation,'" but required a determination of an accused's intent "on the analysis of his own acts and conduct" at the time the crime was committed. It found that the Trial Chamber had determined Rutaganda's specific intent on the basis of his direct participation in specific crimes against Tutsis and that this intent had been demonstrated beyond a reasonable doubt.

Except in regard to Rutaganda's responsibility for killing Emmanuel Kayitare, the Appeals Chamber determined that all of his allegations of errors of law and fact relating to the assessment and treatment of evidence were unfounded. As to the Kayitare killing, the Appeals Chamber rejected the Trial Chamber's finding that the testimonies of two witnesses were corroborative of each other as to the circumstances of the crime when they differed on most material facts. Although corroboration of witness testimony is not a requirement under ICTR practice, the Appeals Chamber determined that, because it was required to "assess the evidence presented at trial as an indivisible whole" and could not substitute its own view of the evidence for that of the Trial Chamber, it "must enter a judgment of acquittal 'if an appellant is able to establish that no reasonable tribunal of fact could have reached a conclusion upon the evidence before it.'" Consequently, it overturned Rutaganda's conviction for murder as a crime against humanity.

The Appeals Chamber then examined the Prosecution's contention that the Trial Chamber had committed an error of fact by failing to find a nexus between the crimes for which Rutaganda was convicted and the armed conflict. The Appeals Chamber adopted the view of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Kunarac* Appeal Judgment that "if it can be established . . . that the perpetrator acted in furtherance of or under the guise of the armed conflict . . . it would be sufficient to conclude that his acts were closely related to the armed conflict." It explained that "'under the guise of the armed conflict' does not mean simply 'at the same time as the armed conflict' and/or 'in any circumstances created in part by the armed conflict.'" Moreover, it emphasized that the finding of such a nexus will usually require consideration of more than one of the factors highlighted in *Kunarac*, including "the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties." Because the Trial Chamber had made factual findings recognizing a link between the ETO school and Nyanza massacres and the armed conflict, and had determined that Rutaganda had participated in these attacks, the Appeals Chamber held that no reasonable trier of fact would have failed to make the "inferential leap" between Rutaganda's acts and the armed conflict. It therefore overturned Rutaganda's acquittal on two counts of violations of common Article 3 to the Geneva Conventions.

The Appeals Chamber did not re-evaluate the Trial Chamber's sentence of life imprisonment due to its determination that the revision of the verdict did not affect the overall gravity of the crimes or the factual basis of the sentence.

PROSECUTOR V. ELIZAPHAN & GÉRARD NTAKIRUTIMANA, CASE NOS. ICTR-96- 10, ICTR-96-17-T.

The Mugonero indictment addressed the April 16th attack on Tutsis gathered in the Mugonero Complex in Kibuye Préfecture. The Complex was run by the Seventh Day Adventist Association and contained a nursing

school, a chapel, and a hospital, as well as other office and residential buildings. Elizaphan was a senior pastor at the Complex, and Gérard worked as a doctor at the Complex hospital. Most of the hundreds killed during the attack were unarmed Tutsi patients and civilians who had sought shelter during the recent violence in the area. The Bisesero indictment addressed numerous attacks in the Bisesero area of Kibuye Prefecture over a period of several months, during which *Interahamwe*, gendarmes, soldiers, and civilians in convoys of vehicles chased and shot at Tutsi refugees, killing hundreds. While chasing the refugees, many of whom were survivors of the massacre at the Mugonero Complex, the attackers sang, “[e]xterminate them; look for them everywhere; kill them; and get it over with, in all the forests.”

Regarding the charge of genocide, the Trial Chamber noted that Elizaphan drove armed attackers to the Complex and to areas in Bisesero where Tutsis were believed to be hiding, pointed out refugees who were attempting to flee, and encouraged the attackers to “kill” and “exterminate” them. He also conveyed attackers to the Murambi Church and ordered them to remove the roof so that it could no longer be used as a hiding-place for the Tutsis, thus facilitating the work of the attackers in hunting them down and killing them. The Chamber considered “his position of authority in the community” in finding that his actions and presence at the scene of the attacks “constituted practical assistance and encouragement, which substantially contributed to the commission of the crime of genocide by these attackers,” thus meeting the elements for aiding and abetting. The totality of this behavior, together with Elizaphan’s knowledge that Tutsis were being targeted for attack, led the Court to conclude that he had acted with the specific intent to commit genocide. After finding Elizaphan guilty of aiding and abetting genocide, the Chamber held that the alternative charge of complicity in genocide ceased to apply without discussing the relationship between these types of responsibility.

The Chamber found Gérard guilty of committing genocide based on his participation in multiple attacks against Tutsi refugees, his killing of three named Tutsis, and his procurement of ammunition and manpower for the attack on the Complex. These actions, together with his leadership (on at least one occasion) of attackers shooting at fleeing Tutsi refugees during the Bisesero attacks, led the Chamber to find that he had acted with genocidal intent.

The Chamber consequently found it unnecessary to consider the alternative charge of complicity in genocide.

In requiring the same level of intent for both aiding and abetting genocide and committing genocide, the Trial Chamber applied a higher standard for aiding and abetting than that required by the International Criminal Tribunal for Yugoslavia (ICTY) Appeals Chamber in the subsequent Krnojelac case and upheld by it again last year in Krstic. In Krstic, the Appeals Chamber did not require that the accused share the principal actor’s specific intent to commit genocide to be found guilty of aiding and abetting genocide. It found that “an individual who aids and abets a specific intent offense may be held responsible if he assists the commission of the crime knowing the intent behind the crime.” Because proof of specific intent to aid and abet genocide would likely imply knowledge that the principle perpetrators acted with the intent to commit genocide, it does not appear that this jurisprudence would have impacted Elizaphan’s conviction on this charge.

Elizaphan and Gérard were also charged with conspiring with each other and with Charles Sikubwabo to commit genocide. The Chamber found that Gérard attended meetings in which he participated in the planning of attacks and distributed weapons, but there was no evidence that Elizaphan or Charles Sikubwabo were present during any of those meetings. Since there was no proof that the accused had an agreement to commit genocide, both Elizaphan and Gérard were found not guilty of this charge. The Chamber noted that to date the ICTR had convicted only one person of conspiracy to commit genocide, following a guilty plea.

Elizaphan and Gérard were also both charged with crimes against humanity for acts of murder, extermination, and “other inhumane acts.” Although the Chamber had found that there was a widespread and systematic attack against the civilian Tutsi population at the Mugonero Complex on April 16th and in Bisesero from April to June 1994, it did not find that Elizaphan had “aided an abetted in the planning, preparation and execution of a crime against humanity (murder).” Gérard was found guilty of the crime against humanity of murder for killing three people. The Chamber found that he shot and killed Charles Ukobizaba during the attack on the Mugonero Complex, killed Esdras at a primary school, and shot and killed the wife of Nzamwita at Muyira Hill. Given the Chamber’s previous

findings that Gérard participated in many attacks, was associated with attackers, and procured munitions and other support for the attackers, the Chamber found that he knew the killings were part of a widespread and systematic attack.

Although the Trial Chamber had previously determined that “many hundreds” of people died in the attacks, neither Elizaphan nor Gérard was found guilty of the crime against humanity of extermination. The Trial Chamber cited the *Vasiljevic* judgment of the ICTY for the proposition that even a “remote or indirect” contribution would be sufficient for a finding of responsibility for extermination. Nevertheless, because only three of the individuals killed had been named or described, it found “insufficient evidence as to a large number of individuals killed as a result of the Accused’s actions.” Comparatively, in its subsequent *Niyitegeka* decision, the Trial Chamber found the accused guilty of extermination because of “his participation in attacks against Tutsi, and his acts of shooting at Tutsi refugees . . . , and his killing of . . . three persons.” Notably, in neither decision were more than three Tutsis killed during the attacks “named or described.”

Elizaphan and Gérard were also found not guilty of the crime against humanity of “other inhumane acts.” The indictment charge Gérard with inhumane acts for closing the medical store, denying treatment to Tutsi patients, and cutting off supplies at Mugonero Complex. Elizaphan was charged with responsibility for Gérard’s acts “by virtue of his position as head of the Complex.” The Trial Chamber found, however, that the Prosecution had not proved that any of these alleged acts had taken place. Elizaphan and Gérard were also charged with inhumane acts for the removal of the roof of the Murambi Church at Bisesero, which had deprived the refugees of a place to hide. The Chamber found that Gérard did not have sufficient notice that he was charged with removing the church roof. While Elizaphan had conveyed attackers to Murambi Church and ordered them to remove the roof, thus facilitating “the hunting down and killing of the refugees,” the Trial Chamber held that it had not been proved that this act “resulted in serious physical or mental suffering, or amounted to a serious attack on human dignity, of the refugees.” The Chamber was also not satisfied that this act met the threshold requirement for this category of crimes that it be “of similar seriousness to other enumerated acts in the Article.”

Gérard was charged with individual criminal responsibility as a superior for genocide, complicity in genocide, and the crimes against humanity of murder, extermination, and other inhumane acts. The Chamber found some evidence that Gérard had taken charge of Mugonero Hospital during the time of the attack, and that he played a prominent role during some of the attacks on Tutsis at Bisesero. Nevertheless, it found that the Prosecution had failed to prove that Gérard had “effective control” over anyone participating in the attacks.

Under the Bisesero indictment, both Elizaphan and Gérard were charged with violations of common Article 3 to the Geneva Conventions and of Additional Protocol II for committing “violence to life, health and physical or mental well-being, in particular murder and cruel treatment of persons not taking an active part in hostilities.” The Chamber stated that the ICTR had never found anyone guilty under this charge and cited the ICTY’s *Vasiljevic* Trial Judgment for the proposition that because “customary international law does not provide a sufficiently precise definition of a crime under this provision,” it violates the principle of *nullum crimen sine lege* (no crime without law). The provision addressed by the *Vasiljevic* holding is not identical to the one at issue in this case, however. Additionally, that holding referred only to the charge of “violence to life and person” as a violation of the laws and customs of war. The offence of murder as a violation of the laws and customs of war was charged as a separate offence and found by the *Vasiljevic* Chamber to be “a well-defined crime under customary international law.” Notably, the provision under which Elizaphan and Gérard were charged explicitly addressed violence that amounted “in particular” to murder and cruel treatment. The *Ntakirutimana* Trial Chamber, however, offered no additional reasons for finding a lack of clarity in the definition of the crime with which they were charged. Nonetheless, the Chamber was also not satisfied that all elements of the offence, including proof of the existence of a nexus between the alleged acts and the armed conflict, had been met.

At sentencing, the Chamber noted as mitigating circumstances that Elizaphan was 78 years old, was in poor health, and “was essentially a person of good moral character until the events of April to July of 1994 during which he was swept along with many Rwandans into criminal conduct.” The Chamber, however, considered these same factors to be aggravating circumstances. Because

many of those killed in the attacks were his own parishioners who had specifically sought his assistance in the hope that his intervention could save their lives, Elizaphan was deemed to have abused the trust placed in him as a leader in the community. Nevertheless, the Chamber sentenced him to imprisonment for ten years. In considering the mitigating circumstances in Gérard’s case, the Chamber noted that he assisted a number of Tutsi women and children during April 1994. However, the Chamber found it “particularly egregious that, as a medical doctor, he took lives instead of saving them.” The Chamber also took into consideration the fact that his crimes were committed with zeal, and that he attacked civilians even in the hospital in which he worked. Determining that the aggravating factors outweighed those in mitigation, the Chamber sentenced Gérard to imprisonment for 25 years.

***THE PROSECUTOR V. JUVENAL KAJELIJELI,* CASE NO. ICTR-98-44A-T**

On December 1, 2003, ICTR Trial Chamber II rendered its judgment and sentence in *The Prosecutor v. Juvénal Kajelijeli*. Charges against Kajelijeli were based on his responsibility for attacks against Tutsis of the Mukingo, Nkuli, and Kigombe communes during April 1994. The Trial Chamber found Kajelijeli guilty of genocide, direct and public incitement to commit genocide, and extermination as a crime against humanity. It found him not guilty of conspiracy to commit genocide and crimes against humanity (rape and “other inhumane acts”), and dismissed the charges of complicity in genocide and crimes against humanity (murder and persecution). He was sentenced to two terms of life imprisonment and one term of 15 years to be served concurrently.

As a former *bourgmestre* of Mukingo commune, Kajelijeli had considerable influence in his community, which he used to act “as a bridge between the military and the civilian spheres in an effort to attack and massacre the civilian Tutsi population.” The Trial Chamber found that he had effective control over the *Interahamwe* paramilitary forces in both Mukingo and Nkuli communes during the period when the attacks that formed the basis of the charges against him took place. Following the death of the President of Rwanda on April 6th, 1994, he had arranged for the *Interahamwe* to receive weapons and played a significant role in directing, organizing, and facilitating their participation in numerous attacks against Tutsis. For example, he assembled members of the *Interahamwe* at a market

on April 7th and instructed them to “exterminate the Tutsis.” Moreover, he commanded and supervised such attacks. The Trial Chamber found that his words and deeds clearly showed that he directed and participated in the killing of Tutsis with the specific intent to destroy them as a group. As a result, it found Kajelijeli responsible under both Article 6(1) of the ICTR Statute for instigating, ordering, and aiding and abetting genocide and under Article 6(3) for the genocidal acts of his subordinates. The Trial Chamber dismissed the charge of complicity in genocide without elaboration after finding that it was an alternative count arising out of the same factual allegations.

Despite Kajelijeli’s attendance at numerous meetings prior to 1994 during which the setting up of militia groups to fight the Rwandese Patriotic Front (RPF) and their accomplices was discussed, his influence over the local *Interahamwe* from January-July 1994, his active participation in training the *Interahamwe* prior to April 6, 1994, and his leadership of a meeting on April 6th during which the killing of Tutsi was orchestrated, the Trial Chamber determined that there was insufficient evidence that Kajelijeli was involved in a conspiracy “from late 1990 through about July 1994” to exterminate Tutsis. It found the evidence inconclusive as to whether or not the extermination of Tutsis had been discussed at the meetings Kajelijeli attended prior to April 6th and as to whether the list of Tutsi names he had drawn up prior to 1992 was for the purpose of identifying those to be eliminated. Moreover, it found no evidence beyond a reasonable doubt that the training of the *Interahamwe* had a genocidal purpose prior to April 6, 1994. As a result, the Chamber found him not guilty of conspiracy to commit genocide.

Because Kajelijeli provoked a crowd assembled at a market, including members of the *Interahamwe*, to kill and exterminate Tutsis, the Trial Chamber found him guilty of direct and public incitement to genocide. It agreed with the *Akayesu* Trial Judgment that an inciter must have the specific intent to commit genocide, which it had already determined Kajelijeli to possess. Because the Trial Chamber did not find that Kajelijeli’s subordinates themselves incited genocide, he was not found guilty of superior responsibility for this crime.

Kajelijeli was also charged with murder, extermination, rape, persecution, and “other inhumane acts” as crimes against humanity based on a widespread attack against the civilian Tutsi ethnic group in Mukingo, Nkuli, and

Kigombe communes. As a result of insufficient evidence, the Prosecution withdrew and the Trial Chamber dismissed the charge of persecution as a crime against humanity. The Trial Chamber also dismissed the charge of murder as a crime against humanity after finding that “there was insufficient distinction drawn in the Indictment between the general allegations of murder as a crime against humanity and extermination as a crime against humanity.” Because the indictment did not specifically identify the victims whom Kajelijeli had been charged with killing, the Chamber decided it was more appropriate for it to consider evidence of individual killings as “examples of the general targeting of populations or groups of people for purposes of extermination, rather than murder specifically.” It then found Kajelijeli guilty of extermination both individually and as a superior for knowingly participating, commanding, and ordering attacks against whole neighborhoods and places of refuge during which nearly the entire Tutsi populations of Mukingo, Nkuli, and Kigombe communes had been eliminated.

On the charge of rape as a crime against humanity, the Trial Chamber held that the Prosecutor had failed to prove beyond a reasonable doubt that Kajelijeli had “planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation or execution of the rapes which the Chamber found to have occurred.” Instead his instructions were, “in general, to kill or to exterminate.” Despite the testimony of several victims, the Trial Chamber found reasonable doubt as to his presence at any of the rapes. Furthermore, although the Chamber determined that numerous rapes were committed by *Interahamwe* under his control, it found it impossible to infer that Kajelijeli either knew or had reason to know that the rapes were being committed. Judge Ramaroson dissented based on what she considered to be credible witness testimony placing him at the scene of a rape, overhearing him order rape, and claiming he asked for a woman to be delivered to him after he finished drinking at a bar. Ramaroson also took into account testimony that placed Kajelijeli’s at the scene of an attack when *Interahamwe* announced to survivors that they would be raped and have bottles placed in their genitals. She argued that whether or not Kajelijeli heard this statement, it demonstrated the atmosphere at the scene and that the *Interahamwe* ordered to kill by Kajelijeli also intended to rape. Moreover, his knowledge of the rapes was demonstrated by his participation in attacks during which rapes took place

and the fact that his subordinates reported back to him each day on their activities. For these reasons, she would have found him personally responsible for rape.

The Trial Chamber likewise held that the Prosecution had failed to prove beyond a reasonable doubt Kajelijeli’s individual responsibility for, presence during, or knowledge of “other inhumane acts” as a crime against humanity committed by members of *Interahamwe* under his control. The Chamber noted that inhumane acts must be similar in gravity to the other enumerated acts of crimes against humanity under the ICTR Statute and must “deliberately cause suffering.” Moreover, the Prosecution must prove a nexus between the inhumane act and the suffering or serious injury to the mental or physical health of the victim. The Trial Chamber found that gross acts of sexual mutilation by the *Interahamwe* of women of Tutsi ethnicity, including the piercing of a dead rape victim’s side and sexual organs with a spear, constituted a serious attack on the human dignity of the Tutsi community as a whole. The Chamber, however, found no evidence that Kajelijeli had been present during such acts. Moreover, the Chamber said that it could not infer from either the evidence or the circumstances that Kajelijeli knew or had reason to know that the *Interahamwe* were committing such crimes.

RIGHT TO SELF-REPRESENTATION IN INTERNATIONAL CRIMINAL COURTS: *PROSECUTOR V. ISSA HASSAN SESAY, MORRIS KALLON, AND AUGUSTINE GBAO*

ON JANUARY 19, 2005, THE TRIAL CHAMBER of the Special Court of Sierra Leone (Special Court) issued its ruling on the *Issue of the Refusal of the Accused Sesay and Kallon to Appear for their Trial*, in the case of *Prosecutor v. Issa Hassan Sesay, Morris Kallon, and Augustine Gbao*. The three defendants are alleged to be part of the original five leaders of the former Revolutionary United Front (RUF), whom the Special Court indicted for war crimes, crimes against humanity, and other serious violations of international humanitarian law. The Special Court withdrew the indictments of the other two alleged leaders, Foday Sankoh and Sam Bockarie, after their deaths. The Special Court issued indictments for Issa Hassan Sesay and Morris Kallon on March 7, 2003, and Augustine Gbao on April 16, 2003. The Trial Chamber ordered the joint trial of the three men and on February 5, 2004, prosecutors issued a consolidated indictment. The RUF trial began on July 5, 2004.

The Third Trial Session started on January 11, 2005, at which time Sesay’s counsel indicated that his client wished to make a statement to the Judges. The Judges were wary of a potential obstruction of the proceedings, but allowed Sesay to make the statement. In his statement, Sesay referred to the amnesty provisions in the *Lomé Peace Accords*, questioning the legality of the charges against him. The Judges found this impermissible and asked him to cease. When Sesay refused to desist from making his statement, Judge Thompson ordered him removed from the court. Sesay maintained that if he was not able to make his statement, he would not attend proceedings. Sesay and Kallon then both submitted written statements as evidence, after which neither returned to the courtroom with their attorneys for further proceedings.

This case raised the issue of whether defendants in the Special Court may be tried despite their refusal to attend their hearings. Article 17(4)(d) of the Statute of the Special Court states that each accused has the right “to be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her choosing.” The Trial Chamber interpreted this provision to obligate a court to try an accused in his or her presence. In doing so, the Trial Chamber cited Rule 60 of the Rules of Procedure and Evidence of the Special Court, which states that an accused may be tried in his absence in only two specific instances: (1) where an accused has made an initial appearance and has been afforded the right to appear at trial but refuses to do so or (2) where, having made an initial appearance, the accused is at large and refuses to appear in court. Rule 60 also states that, in either case, the accused may be represented by counsel of his choice and that the matter may proceed if the Judge or Trial Chamber is satisfied that the accused has waived his right to be present.

In its July 13, 2004, ruling on the third defendant, Augustine Gbao, who refused to appear in court earlier that month, the Trial Chamber allowed the trial to continue without Gbao’s presence but stated that an accused person should only be tried in his or her absence in very exceptional circumstances. The Trial Chamber balanced the need for defendants to be present at their trials with the potential obstruction of justice that would result if trials were delayed due to a defendant’s refusal to appear. The court stated, “an accused person charged with serious crimes who refuses to appear in court should not be permitted to obstruct the judicial machinery by preventing

the commencement or continuation of trials by deliberately being absent.” In light of the fact that the accused were represented by counsel and had made initial appearances before the court, the Trial Chamber concluded that they had waived their rights to be present at their trials. Thus, all three of the living defendants were found to have waived their right to be present at trial.

INTERNATIONAL CRIMINAL ACCOUNTABILITY FOR CRIMES IN DARFUR

ON FEBRUARY 1, 2005, A REPORT by a UN-appointed Commission of Inquiry into international crimes in Darfur, Sudan, released its findings to the public. Among other responsibilities, the five-person Commission was charged with determining whether genocide was occurring in Sudan’s Darfur region. The Commission concluded that the Sudanese government and the Janjaweed militia were responsible for serious violations of international law and strongly recommended that the Security Council refer the matter to the International Criminal Court (ICC). Nevertheless, after finding that “the crucial element of genocidal intent appears to be missing,” the Commission concluded that the Government of the Sudan “has not pursued a policy of genocide.” Because Sudan is not a party to the Rome Statute of the ICC, a Security Council referral is required for the court to have jurisdiction over the crimes committed in Darfur.

In its report, the Commission of Inquiry emphasized that, although the government was not pursuing a genocidal policy, this should not detract from the gravity of the crimes perpetrated. The Commission found that Sudanese government forces and militia “conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement.” The Commission also found substantial evidence that rebel forces were responsible for war crimes, including murder of civilians and pillage. Since Sudanese rebels took up arms in 2003, tens of thousands of people have been killed and up to 1.85 million others are internally displaced or are now refugees in neighboring Chad.

Although the Commission did not find genocidal intent, it determined that the attacks were launched for counter-insurgency purposes and were “deliberately and indiscriminately directed against civilians.” Even when attacks

were directed at rebels, the use of force was disproportionate to the threat posed. The Commission recommended that the matter be referred to the ICC because it found that the Sudanese government would not be able to adequately address the problem. The Commission stated that “the measures taken so far by the Sudanese government to address the crisis have been both grossly inadequate and ineffective, which has contributed to the climate of almost total impunity for human rights violations in Darfur.” The Commission went on to say that “very few victims have lodged official complaints regarding crimes committed against them or their families, due to a lack of confidence in the justice system.”

Additionally, the Commission recommended the establishment of a reparations system for the victims of the crimes, whether or not perpetrators have been identified. The Commission also gave Secretary-General Kofi Annan a sealed file of names of persons believed to be responsible for the crimes. This list would eventually be given to the ICC prosecutor if the situation is referred. Annan stated that although his support for the ICC was well known, a potential referral to the ICC was a decision for the Security Council.

A Security Council referral on the situation in Darfur to the ICC is quite controversial. The United States, in the face of strong European opposition, is heavily lobbying the Security Council to avoid referring the matter to the ICC, a campaign that reflects the Bush administration’s stance against the tribunal. The Bush administration fears the ICC may bring frivolous prosecutions against American soldiers and civilians abroad. In addition to the Secretary General’s vocal support, a majority of the 15 members of the Security Council is known to favor referring the matter to the ICC. This poses a dilemma for the United States, which has demanded accountability and sanctions against the Sudanese authorities, but which also opposes the ICC.

The proposed alternative, as suggested by Pierre-Richard Prosper, the United States Ambassador-at-Large for war crimes, is to refer the Darfur charges to a new African war crimes tribunal to be based at the headquarters of the International Criminal Tribunal for Rwanda in Arusha, Tanzania. The UN and the African Union would jointly administer this new court. Both the Commission of Inquiry and human rights groups have expressed concerns, however, that this alternative would be exces-

sively costly and time-consuming. With no set time frame to make a decision, it seems that the international community’s ideological fight over how to bring justice to the victims in Darfur is simply adding to the inconceivable injustices they have already suffered.

INTERNATIONAL CRIMINAL COURT

ON JANUARY 7, 2005, PRESIDENT BOZIZÉ of the Central African Republic (CAR) submitted a referral to the Prosecutor of the International Criminal Court (ICC) for crimes committed on CAR territory since July 1, 2002, when the Rome Statute came into force. Intervention by the ICC may prove unnecessary, however, if the CAR implements internal changes to address these crimes. Regardless of whether the ICC prosecutes these crimes, measures must still be taken to stop the on-going violence and to prevent further human rights violations in the CAR. As it stands, on January 20, 2005, ICC President Phillippe Kirsch (Canada) assigned the situation to Pre-Trial Chamber III, over which judges Hans-Peter Kaul (Germany), Tuiloma Neroni Slade (Samoa), and Sylvia Steiner (Brazil) preside.

Since 2000, the UN has promoted a peaceful transition in the CAR through its Peacebuilding Office (BONUCA) to help the nation recover from decades of armed conflict. The Central African Republic broke from French colonial rule in 1960 when David Dacko, its brutal dictator, rose to power. Jean-Bédél Bokassa then overthrew Dacko and ruled the CAR until a French-initiated coup in 1979 restored Dacko to power. The country underwent a series of violent coups from 1981 to 2003, the most recent of which saw the overthrow of President Ange Félix Patassé by the current President François Bozizé, but officially became a democracy in 1993. An ICC referral would address the wide range of crimes committed in the Central African Republic since July 1, 2002.

Despite recent progress, controversy surrounds the March 2005 elections in the CAR, renewing the threat of instability. On December 30, 2004, the Transitional Constitutional Court disqualified 10 out of the 15 presidential candidates for failing to deposit the required \$10,000, failing to own property within their constituencies, submitting fraudulent documents to the electoral commission, misappropriating public funds, or committing human rights violations. The court specifically denied candidacy to former president Ange

Félix Patassé, members of his cabinet, and members of his political party, the *Mouvement de Libération du Peuple Centrafricain*. President Bozizé attempted to overturn the court's decision by authorizing additional candidates pursuant to Article 22 of the CAR's new Constitution, which allows the president to ensure "the regular functioning of the public powers and continuity - of the state." The court denies Bozizé's authority to overrule it.

Secretary-General Kofi Annan's latest report on the situation emphasized the importance of consensus and legitimacy in the CAR's democratic process. Annan praised the referenda establishing the new transitional constitution (December 5, 2004) and the draft electoral code that was voted on in February 2005. Security Council President César Mayoral (Argentina) recently voiced his confidence in the CAR's movement toward constitutional legitimacy and the rule of law.

In line with this optimism, ICC Prosecutor Moreno-Ocampo may opt against a formal ICC investigation. The Prosecutor must first determine whether the CAR satisfies the criteria set forth in the Rome Statute. Specifically, he must assess the existence of national proceedings in the CAR, the gravity of alleged offenses, and the interests of justice. The ICC is a court of last resort, aiming to complement, rather than supplant, national systems. If the Prosecutor determines that the CAR is already undertaking a credible investigation of the alleged crimes, the ICC may defer to the national legal system.

An ICC investigation may be viewed as problematic because the court cannot investigate crimes that occurred prior to the Rome Statute's inception in July 2002. Human rights advocates support a long-term action plan that would punish all grievous violations, regardless of when they occurred and regardless of the suspect's nationality. This plan would require the CAR to implement legislation that incorporates into national law those crimes already codified in the Rome Statute and other international human rights treaties.

The CAR now has an opportunity to demonstrate its commitment to addressing the atrocities that accompanied years of political instability. Regardless of whether the ICC prosecutes these crimes, human rights groups implore the CAR government to take action to prevent further attacks against civilians by the Bozizé government and Patassé's opposition forces.

EAST TIMOR

ON DECEMBER 23, 2004, INDONESIA AND EAST TIMOR agreed to establish a Truth and Friendship Commission to investigate human rights abuses and address the 1,500 murders committed in the aftermath of the 1999 East Timorese referendum on independence from Indonesia. The announcement came on the heels of increased international advocacy for an independent and impartial commission to review the work of the *ad hoc* human rights tribunal in Jakarta and the Special Panels for Serious Crimes in East Timor. The United States proposes that this Truth and Friendship Commission coordinate its investigation with a UN-backed Commission of Experts.

In 2000, Indonesia established an *ad hoc* tribunal in Jakarta to prosecute police and military officers who participated in the murders and forced relocation of 275,000 people in East Timor during Indonesian control. While the *ad hoc* court has convicted six out of 18 suspects, it eventually reversed five convictions on appeal, with an appeal of the sixth still pending. This situation has raised doubts about the court's effectiveness and impartiality. The UN-supported Special Panels for Serious Crimes in Dili, in comparison, have indicted almost 400 people and convicted 72 lower level offenders. Most of the senior officers responsible for human rights violations have sought refuge behind a shield of impunity in Indonesia, however. Both tribunals have so far failed to meet the objectives of UN Security Council Resolution 1272, which calls for "all those responsible for such violence [to] be brought to justice."

As a result of international pressure, the UN created a Commission of Experts to investigate the impartiality and independence of prosecutions in the *ad hoc* court in Jakarta and the effectiveness of Special Panels for Serious Crimes in Dili. The three experts named in February 2005 are Justice Prafullachandra Bhagwati of India, Professor Yozo Yokota of Japan, and Shaista Shameem of Fiji. The establishment of the Commission of Experts has been well received by human rights advocates. Indonesian Foreign Minister Wirajuda, however, is promoting the Truth and Friendship Commission as an alternative. Both Wirajuda and East Timorese Foreign Minister Jose Ramos Horta agree that implementing both commissions would be redundant, and they tout the Truth and Friendship Commission as an opportunity to bring a resolution to the 1999 atrocities. Indonesia and

East Timor are expected to finalize the Truth and Friendship Commission's framework and implementing mechanism in early 2005.

Although the Truth and Friendship Commission is modeled after established Truth and Reconciliation Commissions such as that in South Africa, it has been criticized for focusing more on strengthening the economic friendship between East Timor and Indonesia than on combating impunity. In a statement to Kofi Annan, the International Federation for East Timor, an organization which promotes human rights in East Timor, contends that the Truth and Friendship Commission would only advance the status quo because "a bi-national commission will just be another mechanism for Indonesia to bully its smaller, weaker neighbor." Timorese rights activists, moreover, question the strength of this commission, fearing that it will deny justice to victims and their families because it focuses on lower offences, lacks authority to punish crimes, and stresses forgiveness. Many victims are concerned that they will be forced to forgive the perpetrators and will be denied the opportunity to prosecute them. At the same time, East Timor must consider the reasons for moving forward with the establishment of the Truth and Friendship Commission, as it depends on a sound relationship with Indonesia for a vast majority of its imports and for its border security. The mechanism by which the Truth and Friendship Commission will facilitate the telling of peoples' stories remains unclear. HRB

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