

UPDATES FROM THE INTERNATIONAL CRIMINAL COURTS

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

On April 3, 2007, the Appeals Chamber rendered an important judgment in *Prosecutor v. Radoslav Brdjanin*. Brdjanin, the former President of the ARK Crisis Staff and ARK War Presidency, was convicted by the Trial Chamber of persecution, torture, deportation, forcible transfer, willful killing as a grave breach of the Geneva Conventions, and other crimes. In the appeal, Brdjanin asserted a staggering 172 errors in the Trial Chamber judgment. In general, he argued that the Trial Chamber misapprehended his control over and role in the ARK Crisis Staff, and his connection and control in implementation of the “six strategic aims” developed for the ethnic cleansing of non-Serbs. The Appeals Chamber reversed Brdjanin’s conviction for persecution as a crime against humanity “insofar as it incorporates torture as a crime against humanity committed in camps and detention facilities,” and also reversed his conviction for torture as a grave breach, limiting the reversal to “torture committed in camps and detention facilities only.” Finally, Brdjanin’s conviction for wanton destruction and appropriation of property was overturned in regard to the Bosanska Krupa municipality. The reversals lead to a reduction in Brdjanin’s original 32 year sentence to 30 years with credit for time served.

More importantly, the Appeals Chamber’s ruling on the prosecution’s appeal promises to affect how liability is established in future cases of mass criminality. The prosecution challenged the Trial Chamber’s failure to find Brdjanin guilty based on his participation in a joint criminal enterprise (JCE). The JCE mode of liability may apply where a plurality of persons acts pursuant to a common criminal plan to commit one or more of the crimes listed in the Tribunal’s Statute. The JCE mode of liability is useful for establishing the responsibility of political and military leadership figures for multiple related crimes, such as willful killings carried out in support of an ethnic cleansing campaign. All of the members of the JCE plurality are held responsible for crimes committed or otherwise caused by their JCE co-participants. In Brdjanin, the Trial Chamber had held that a defendant cannot be held responsible through a JCE if the

actual physical perpetrator of the target crime was not a member of the JCE plurality. Moreover, the Trial Chamber held that the prosecution must prove a specific agreement existed between the physical perpetrator and the accused JCE member to commit the target crime. The Appeals Chamber reversed both of these holdings finding that they unduly restricted the scope of the JCE mode. In future cases, JCE liability may be established even where there is no evidence of a specific agreement between a JCE member and the physical perpetrator of a crime. Additionally, all of a JCE plurality’s members may be responsible where one of the plurality members uses individuals outside the JCE to perpetrate a crime in support of the common plan.

On April 4, Trial Chamber I sentenced Dragan Zelenović, a former Bosnian Serb soldier and military policeman, to 15 years imprisonment. Zelenovic pled guilty in January to seven charges of torture and rape of numerous Bosnian Muslim women detained in Foča municipality. Zelenović was found personally guilty of committing nine of the rapes, eight of which met the criteria for both torture and rape, and one instance of torture and rape through aiding and abetting. The rape and torture of these women was found to be part of a pattern of sexual assaults on women in eastern Bosnia and Herzegovina from July to October 1992. The Trial Chamber found that Zelenović’s participation was substantial and noted that “[t]he scars left by the sexual assaults were deep and will perhaps never heal. This, perhaps more than anything, speaks about the gravity of the crimes in this case.”

On February 7, 2007, the Trial Chamber found Domagoj Margetić guilty of contempt of court, sentencing him to three months imprisonment and a \$10,000 fine. Margetić, a freelance journalist from Croatia, was found to have disclosed a protected witness list on his personal website even though he had explicit notice that the list was strictly confidential. In deciding the appropriate sentence for Margetić, the Trial Chamber considered the psychological impact disclosure had on the large number of witnesses on the list. Margetić is now the nineteenth defendant found in contempt by the ICTY.

In *Gotovina et al.*, the Trial Chamber allowed General Ivan Cermak to return to

Croatia on February 15 even though he knowingly violated his provisional release. More specifically, Cermak had been seen at several social events, including a ski race, despite the condition that he could only leave home to go to work in Zagreb. The Trial Chamber was more lenient on Cermak because he had turned himself in to the Tribunal voluntarily, but warned that “any further action of this sort will result in immediate revocation of his provisional release.” Cermak has been indicted for planning, establishing, implementing, and participating in a JCE to permanently remove the Serb population from the Krajina region.

The Appeals Chamber affirmed the sentence of 20 years imprisonment for Miroslav Bralo on April 2. Bralo, formerly a member of the “Jokers” anti-terrorist unit of the Croatian Defence Council (HVO), pled guilty in July to all eight counts, including persecution, murder, torture, rape, unlawful confinement of civilians, and inhuman treatment. The Appeals Chamber dismissed all grounds of appeal and unanimously ruled that a reduced sentence was unjustified.

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

On February 23, 2007, Joseph Nzabirinda was sentenced to seven years imprisonment after agreeing to plead guilty to aiding and abetting murder, a crime against humanity. Nzabirinda was a businessman and youth organizer in Ngoma commune in 1994, and was accused of having agreed to and participated in a plan to exterminate the Tutsi population of the Sahera sector. Nzabirinda had previously worked as an investigator with the ICTR until his employment contract was canceled for providing forged documents.

PROSECUTOR V. ANDRÉ RWAMAKUBA CASE NO. ICTR-98-44C-T

On September 20, 2006, the Trial Chamber of the International Criminal Tribunal for Rwanda (the ICTR or Tribunal) issued its judgment in the case of *Prosecutor v. André Rwamakuba*, finding André Rwamakuba not guilty on all charges. On January 31, 2007, the Trial Chamber issued a decision determining the remedy for the Registrar’s failure to provide counsel during four months

of Rwamakuba's detention. This is the first case in which an international court has considered the appropriate remedy for violations of the pre-trial rights of an accused found not guilty on all charges.

Rwamakuba was a public health specialist in Rwanda and a member of the "Hutu Power" wing of the *Mouvement démocratique du Rwanda* (MDR) political party. Upon the death of President Habyarimana in 1994 and the start of the genocide, the interim government appointed him Minister of Primary and Secondary Education. The ICTR Prosecutor alleged that Rwamakuba was individually responsible for genocide or complicity in genocide and the crimes against humanity of extermination and murder in Gikomero *commune* and at the Butare University Hospital from April 6-30, 1994. Rwamakuba was arrested by Namibian authorities on behalf of the ICTR in 1998. His case was severed from the joint indictment in the *Karempera et al.* case and brought to trial in 2005.

The indictment alleged that by failing to "denounce the crimes committed against the Tutsi, [o]r to dissociate himself from the [Interim Government]," Rwamakuba "directly failed to discharge the duties entrusted to him, which he had sworn to fulfil, and that he encouraged the genocidal activities." Nevertheless, the Trial Chamber found that the Prosecution gave "clear and consistent information" throughout the trial that it intended to focus only on Rwamakuba's direct participation in the crimes alleged. Additionally, at trial the Prosecution did not provide evidence of any legal duty "under which [Rwamakuba] was mandated to act and which failure to do so would constitute a criminal act." Consequently, the Chamber refused to consider allegations of Rwamakuba's political activities as anything other than "context or background from which inferences could be drawn either concerning his intent, his disposition or other elements of his individual participation in specific crimes."

SUBSTANTIVE CHARGES

The Prosecution alleged that Rwamakuba used his position as spokesman for the Hutu Power wing of the MDR to instigate genocide during a series of meetings and rallies in Gikomero *commune*. However, the Chamber found the witness testimony inconsistent with the indictment and, further, that much of the testimony was unreliable. According to the Chamber, witnesses were unable to give satisfactory descriptions of Rwamakuba and pre-

sented inconsistent dates for the alleged meetings. Additionally, Rwamakuba provided evidence of an alibi that the Chamber found convincing.

The Prosecution also alleged that Rwamakuba delivered machetes to André Muhire and Etienne Kamanzi in Gikomero *commune* between April 10-11, 2004 and that he did so with knowledge that the machetes would be used in attacks on Tutsis. According to the indictment, Muhire received bags of machetes from Rwamakuba and then distributed them to local residents, who used them to massacre Tutsis at the Ndatemwa trading center. Kamanzi, who was the director of the Kayanga Health Center, also allegedly received machetes from Rwamakuba and gave them to residents who used them to kill Tutsi in the area and at the Kayanga Health Center. The Chamber noted that one witness testified that the machete delivery to Muhire's home took place on April 12 while another witness said it took place between April 10 and 11. A third witness first placed the event between April 10 and 13 but on cross-examination said it could have taken place on April 12. Consequently, the Chamber found that this testimony was inconsistent with the indictment, which alleged that the event took place between April 10 and 11. Additionally, the Trial Chamber highlighted the fact that the Prosecution's sole witness testifying to the machete delivery to Kamanzi had been found not credible by the Trial Chamber in the *Kamuhanda* case.

Rwamakuba was additionally accused of encouraging and participating in the murder of three Tutsi men near the Gikomero *secteur* office. The indictment alleged that Rwamakuba seized identification documents of two young men, ordered the crowd to kill them, and looked on as they were murdered. Allegedly, the crowd then stopped another man on a motorcycle whom, on Rwamakuba's orders, they also killed. The Chamber found that the witness testimony relating to the date of the murders was inconsistent with the indictment. Additionally, one witness's testimony contained "major discrepancies" with prior statements and her physical description was "vague and contradictory." This, together with defense testimony relating to her character and personality, as well as her criminal record, combined to undermine her credibility.

The indictment also accused Rwamakuba of participating in a massacre at Kayanga Health Center between April 13 and 15. It alleged that he gave the signal to the *Interahamwe* and police to begin the massacre during which

"about a hundred" patients and refugees were killed, leaving no survivors. Once again, the Chamber found that witness testimony was inconsistent with the indictment and "suffer[ed] major challenges" concerning credibility. These challenges included problematic identification of Rwamakuba, inconsistencies with prior statements, reluctance to answer questions, and hearsay. One witness had met with the Prosecution four times without ever mentioning Rwamakuba's participation in the Kayanga massacre. Furthermore, the Defense produced a witness who admitted to participation in the massacre but who nevertheless denied Rwamakuba's involvement.

Finally, the Prosecution accused Rwamakuba of directly participating in murders at Butare University Hospital in April 1994. According to the indictment, he encouraged the murder of patients and refugees and personally killed a number of patients with an axe. The Chamber again found the evidence inconsistent with the indictment and the witnesses to lack "credibility and reliability" in their identification of Rwamakuba. Additionally, the Defense presented alibi evidence that the court found "consistent and objective enough to levy an additional doubt on the Prosecution's case."

The Chamber consequently found that the Prosecution failed to prove beyond a reasonable doubt Rwamakuba's participation in any of the alleged crimes.

VIOLATIONS OF FUNDAMENTAL RIGHTS — LENGTH OF DETENTION

ICTR Statute Article 19 guarantees "fair and expeditious" trials. However, in a 2005 Decision on Defense Motion for Stay of Proceedings, the Trial Chamber rejected the Defense's assertion that Rwamakuba's eight years in detention constituted an "undue delay" in the proceedings. According to the Trial Chamber, the length of the proceedings resulted from difficulty in assigning counsel to Rwamakuba, the complexity of the original joint indictment, the necessity of reconstituting a Chamber after the Presiding Judge withdrew, and the severance of Rwamakuba's case from the joint indictment. The Chamber noted that "the proceedings ... continuously advance[d] taking into account the particularities and the complexity of the case." Therefore, it did not find that this delay violated Rwamakuba's fair trial rights under the Statute.

Following its 2006 judgment of acquittal, the Chamber rejected the Defense's contention that Rwamakuba was "indicted and prosecuted on false and manipulative evi-

dence” which, combined with the total length of his detention, constituted a miscarriage of justice. The Chamber noted that pre-trial detention “should remain exceptional or, at least, limited to what is reasonable and necessary.” Furthermore, it found that some remedy “would be fair” when an accused is subject to lengthy detention. Ultimately, however, the Chamber found that neither customary international law nor the Statute or Rules of the Tribunal nor “any other applicable source of law in this regard” provides for compensation for persons acquitted after a lengthy detention when the length of the proceedings did not amount to “undue delay.”

VIOLATIONS OF FUNDAMENTAL RIGHTS — RIGHT TO COUNSEL

On December 2000, the Trial Chamber found that Rwamakuba suffered a violation of his right to counsel due the Registrar’s failure to provide him with duty counsel during the first four months of his detention in the UN detention unit as required by the ICTR Rules of Procedure and Evidence. Although the Trial Chamber found that the violation did not cause Rwamakuba a “serious and irreparable prejudice,” it found that he was entitled to an “effective remedy” for the violation of his fundamental human rights. In June 2001, the Appeals Chamber affirmed that Rwamakuba’s right to counsel was violated and noted that “it is open to the Appellant to invoke the issue of the alleged violation of his fundamental human rights by this Tribunal in order to seek reparation as the case may be, at the appropriate time.”

After finding Rwamakuba not guilty on all charges in its 2006 judgment, the Trial Chamber invited Rwamakuba to file an application seeking a remedy for the violation of his rights while in detention. It issued its decision on an appropriate remedy on January 31, 2007.

In its 2007 decision, the Trial Chamber found that even though there is no explicit right to a remedy for a violation of right to counsel in the ICTR Statute or Rules, the power to provide such a remedy is inherent in the powers of the Tribunal and necessitated by its obligation to respect international human rights norms. The Chamber noted that customary international law demands that “any violation of a human right entails the provision of an effective remedy.” When an accused is found guilty, the remedy is generally a reduction in the sentence. According to the *Barayagwiza* and *Semanza* cases, when an accused is found not guilty, the remedy can take the form of financial compensation.

The Chamber noted that there is no explicit provision in its Statute allowing it to provide financial compensation. However, it found that since the Security Council “cannot have intended that the Tribunal would be in breach of generally accepted international human rights norms,” it must have “accorded it the power necessary to comply with such norms and thus carry out its functions as a judicial body.” Consequently, the provision of a remedy was within its judicial obligation and the Tribunal must “have the inherent power to make an award of financial compensation.” Additionally, it rejected the argument of the Registrar that there was no budget or mechanism for providing compensation. The Chamber considered these to be “immaterial” and “extra-legal” considerations that should not prevent the provision of remedies and which “may not be invoked as justification for [the Registrar’s] failure to comply with an international obligation.”

In determining the appropriate remedy, the Chamber found that the violation of Rwamakuba’s right to counsel did not affect the overall fairness of the trial. Nevertheless, the violation required compensation for any emotional harm that might have resulted, including “confusion, isolation and distress.” Consequently, the Chamber awarded Rwamakuba \$2,000 and ordered the Registrar to apologize for the violation. The Chamber also required the Registry to “use all available means to seek the good offices of the State where André Rwamakuba’s family is present to facilitate some temporary status for him in that State and to seek the good offices of that State to ensure the uninterrupted schooling of his children.” Notably, it found that the Registry should use its good offices in this manner not because of the infringement of Rwamakuba’s rights but “as a matter of course” after an acquittal.

INTERNATIONAL CRIMINAL COURT

PROSECUTOR v. THOMAS LUBANGA DYILO, CASE NO. ICC-01/04-01/06

The Pre-Trial Chamber’s (PTC) January 29, 2007 confirmation of charges against Thomas Lubanga Dyilo generated much debate, and resulted in appeals from both the Defense and the Prosecution. The PTC introduced two significant alterations in the charges. The Prosecution charged Lubanga, former leader of the Union of Congolese Patriots (UPC) and its military wing, the Patriotic Forces for the Liberation of the Congo (FPLC), with individual criminal responsibility under Article 8(2)(e)(vii) for

the war crimes of enlisting and conscripting children in the conduct of hostilities in an internal armed conflict. However, the PTC held that the conflict was international due to the presence of Ugandan forces in Ituri, changing the crime in the charging document to the enlistment and conscription of children in an international conflict under Article 8(2)(b)(xxvi). The PTC also reduced the temporal scope by only confirming the charges from September 2002 through August 2003. The Prosecution had charged Lubanga with crimes committed between July 2002 and December 2003.

Chief Prosecutor Luis Moreno-Ocampo filed an application for leave to appeal on February 5, 2007, arguing that the PTC does not have authority to change the legal characterization of the Prosecution’s charges under the Rome Statute. Moreno-Ocampo asserted that the decision placed an additional burden on the Prosecution by forcing it to prosecute a crime for which it has no evidence, and possibly requiring it to collect new evidence to demonstrate the international context by establishing Ugandan forces controlled Lubanga and his actions.

Article 61 of the Rome Statute establishes three possible PTC rulings during confirmation hearings: it may affirm the charges, deny the charges, or adjourn the hearing and request the Prosecutor either to provide further evidence or amend the charges. The fact that the PTC took actions not mandated by the Statute allows for the possibility that the Appeals Chamber may rule the PTC exceeded its authority. Yet the PTC could make a sound argument that it was necessary to effectively correct the Prosecution by re-characterizing the conflict as international because, in a 2005 decision, the International Court of Justice (ICJ) deemed the conflict international by ruling that Uganda occupied the disputed territory in Ituri between 1998 and 2003.

The Prosecutor acknowledged in his appeal that the conflict had a substantial international element, but stated he believed it would not be the most efficient use of resources to prove the crimes occurred in an international context. The Prosecutor argued this would necessitate proof Uganda exercised “effective control” over Lubanga’s forces. Yet the ICJ has already established the conflict in Ituri was international, and according to legal scholars, once occupation has been established, there may be no further requirement to prove effective control. According to the PTC, there is no need to prove Lubanga’s crimes were committed in an

international context, because the crimes themselves are the same, whether committed in an international or national context.

Legal scholars have debated the reasoning behind the PTC's decision, if it was not intended to require the Prosecutor to prove an international context. Some argue that the PTC may have decided that the Prosecutor's mandate to "establish the truth," pursuant to Article 54 of the Rome Statute must take precedence over his prosecutorial strategy to select a limited number of incidents to maintain efficient and focused investigations and prosecutions. Others argue that the PTC may have been wary of creating a perception of political cooperation between the Court and the Government of Uganda, and decided to send a message that Uganda's cooperation in the ICC's investigation there will not grant it blanket immunity. Regardless of the reasoning, the Appeals Chamber must decide whether the PTC's ruling is permissible under the Rome Statute.

UPDATE ON DARFUR SITUATION, SITUATION ICC-02/05

On February 27, 2007, the Prosecutor filed an application to the Pre-Trial Chamber, requesting the issuance of summonses for two leaders in Darfur accused of committing atrocities against the civilian population. The application alleges that there are reasonable grounds to believe that State Minister for Humanitarian Affairs Ahmed Harun and Janjaweed militia leader Ali Kushayb bear criminal responsibility for fifty-one counts of war crimes and crimes against humanity including: rape, murder, persecution, torture, forcible transfer, destruction of property, pillaging, inhumane acts, outrages upon personal dignity, attacks against the civilian population, and unlawful imprisonment or severe deprivation of liberty.

The summonses are significant for several reasons. The summons for Ahmed Harun marks the first time the Prosecutor has named a government official; other warrants thus far have only been for rebel group leaders. Legal scholars have speculated that issuing summonses for both a government official and a Janjaweed leader indicates that the Prosecutor will seek to establish that the Government of Sudan did have strong links to the Janjaweed and exerted control over the crimes they committed. The summons against Ali Kushayb includes charges of sexual violence, a category of crimes the Prosecution has been harshly criticized for failing to address.

Yet the Prosecutor's application has also drawn criticism, as observers ask why he applied for summonses instead of arrest warrants. Arrest warrants impose obligations on States Parties, or states that are otherwise required to cooperate, to arrest the individual and surrender that person to the ICC. Summonses impose no obligations on states, and serve more as a request to appear. Pursuant to Article 58(7), summonses can be issued as an alternative to arrest warrants if there is reason to believe a summons would be sufficient to ensure the appearance of the accused. Given the immense gravity of the crimes, and the fact that the Sudanese government has announced that it will cease cooperation with the ICC, some legal scholars argue that the two accused will not respond to a summons. Compounding matters, Ali Kushayb is in custody in Sudan, and consequently may not be at liberty to appear before the PTC. Both have declared they are innocent.

As some analysts have observed, the Prosecutor needs full cooperation of the Sudanese government to proceed, and may have issued summonses instead of arrest warrants as an attempt to ensure cooperation. Some human rights organizations expressed disappointment that higher-level government officials were not named, and called on the Prosecutor to go higher up the chain of command in his investigations. The Prosecutor has stated he will continue to investigate cases sequentially, and may eventually be faced with the problem of issuing arrest warrants for government officials who had been providing cooperation. The PTC will decide whether to issue the requested summonses.

PROSECUTOR v. JOSEPH KONY, VINCENT OTTI, OKOT ODHIAMBO, RASKA LUKWIYA, DOMINIC ONGWEN, CASE No. ICC-02/04-01/05

Peace talks between the Ugandan Government and the rebel Lord's Resistance Army (LRA) are scheduled to resume in Juba, South Sudan on April 26th 13, 2007, after a months-long stalemate. The ceasefire between the Uganda Peoples' Defense Force (UPDF) and the LRA expired on February 28, 2007, but no further violence was reported. After the Prosecutor requested a summons for a Sudanese official implicated in crimes in Darfur, Khartoum announced the suspension of all cooperation with the ICC, which reportedly allayed Kony's fears of arrest there. The new UN Secretary General's Special Envoy for the LRA-Affected Areas, former Mozambique President Joaquim Chissano, traveled to

Kony's refuge in the DRC jungle for a closed meeting. In mid-March, Kony announced he would be willing to allow the LRA delegation to return to Juba for peace talks under conditions that security be increased, and delegates from other African countries participate. Subsequently, the governments of Kenya, Tanzania, South Africa, Mozambique and the DRC agreed to name observers. At informal talks in Kenya in early April, the Government of Uganda reportedly agreed to ask parliament to pass laws recognizing traditional reconciliation rituals, and to approach the ICC to discuss the arrest warrants.

Forty-nine victims have applied to participate in the Uganda proceedings thus far. The ICC is the first international criminal tribunal to establish the right of victims to participate as independent parties in the proceedings. Victims' rights groups have expressed concern that the Court, in particular the Office of the Prosecutor, often opposes victim participation. On February 1, 2007, the PTC found that victim applicants do not have an absolute right to legal counsel, and denied the applicants counsel until their status as victims is confirmed. It referred them to the Office of Public Counsel for Victims to receive assistance until further notice.

On February 6, 2007, the Prosecutor requested an un-redacted version of the victims' applications. In order to protect the victims, the PTC rejected his request, finding that it had no procedural basis. The Prosecutor stated he was unable to file a response regarding his assessment of the victims without full information, but said twelve of the forty-nine did not appear to qualify. He repeated his earlier assertion that victims should not be permitted to participate at such an early stage before confirmation hearings are held because it hinders the expeditious conduct of the proceedings, and victims cannot have a personal interest at this early stage. **HRB**

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