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UPDATES FROM THE INTERNATIONAL AND INTERNATIONALIZED CRIMINAL TRIBUNALS

INTERNATIONAL CRIMINAL COURT

ICC AUTHORIZES PROSECUTOR'S REQUEST TO OPEN INVESTIGATION IN CÔTE D'IVOIRE

On October 3, 2011, Pre-Trial Chamber III of the International Criminal Court (ICC) authorized Prosecutor Luis Moreno-Ocampo's request to open an investigation in Côte d'Ivoire. In his request, the Prosecutor sought authority to investigate crimes within the Court's jurisdiction committed during Côte d'Ivoire's post-election violence in 2010-2011 between forces loyal to incumbent President Alassane Ouattara and those loyal to now-ousted former President Laurent Gbagbo. Three thousand people were killed, 72 disappeared, 520 were arbitrarily detained, and 100 cases of rape were reported. The authorization is based on a finding that the Prosecutor established a reasonable basis to believe that crimes within the jurisdiction of the ICC had been committed by both pro-Ouattara and pro-Gbagbo forces. Though Côte d'Ivoire is not a State Party to the ICC, President Ouattara confirmed its acceptance of ICC jurisdiction, most recently in May 2011. Article 12(3) of the Rome Statute—the ICC's founding treaty—allows non-States Parties to accept ICC jurisdiction on an *ad hoc* basis.

With elections for the next Chief Prosecutor approaching in December, the investigation presents one of Prosecutor Ocampo's final opportunities to bolster the legitimacy of his office, strengthen its legacy, and provide a positive starting point for his successor. To do so, the Prosecutor must develop a coherent and well-executed investigation strategy that communicates the ICC's mandate to victims and affected communities who seek justice, and sets the tone for the prosecution of perpetrators throughout Côte d'Ivoire. In light of a recent report by Human Rights Watch, the investigation in Côte d'Ivoire has implications for the credibility of the ICC and presents an opportunity to improve on past techniques.

The report found that the absence of a well-communicated and coherent inves-

tigative strategy within the Office of the Prosecutor (OTP) threatened its independence and impartiality during the course of investigations in the past. In these prior situations, the OTP failed to investigate all sides of a conflict or issued inconsistent charges for similar crimes. In other cases, it failed to trace responsibility for crimes to the higher levels of government. Together, these discrepancies foster perceptions that the ICC is not independent from government control or that it favors one group over another. The failure to move forward with investigations of certain subjects creates an impression that they are innocent, severely damaging the restorative efforts of affected communities who know these individuals to be responsible and had expected the Court to expose the truth.

In fulfilling its investigative mandate, the OTP must identify patterns of crimes and trace the chain of responsibility to individuals most responsible for the crimes. The principles of independence and impartiality require the OTP to investigate alleged perpetrators on all sides, which in the situation in Côte d'Ivoire includes agents and forces loyal to President Ouattara, many of whom now occupy key government positions. Yet the OTP is highly dependent on government cooperation while inside a country to fulfill its document collection and witness interview obligations, which makes it difficult to effectively investigate and prosecute such upper-level individuals.

Prosecutor Ocampo must therefore demonstrate in his final months that he can strike a delicate balance in Côte d'Ivoire—one that achieves the goals of impartiality and independence while maintaining the degree of state cooperation that is critical for a complete and thorough investigation. On one hand, the failure to carry out an impartial investigation of those most responsible from all parties to the conflict risks delivering the kind of "victor's justice" that neglects victims and fails to deter those who might view crimes as a means to victory. On the other hand, the OTP must remain unbiased without alienating state officials; otherwise, those implicated may frustrate the investigation process out of self-interest, restricting access to

evidence, witnesses, and affected communities. Implicated officials might also threaten the safety of victims who wish to participate as witnesses.

The investigation in Côte d'Ivoire demands an independent and impartial approach to ensure not only that affected communities experience meaningful justice, but also that the ICC avoids costly perceptions of bias and maintains support from the international community in its efforts to confront impunity in future situations. The OTP can foster cooperation by strictly adhering to core values of justice and fairness, which will attract allies within Côte d'Ivoire who are willing to collaborate. The OTP might also openly denounce non-cooperation to encourage the international community to exert pressure on the state to fulfill its obligation to cooperate with the Court. In all, Prosecutor Ocampo must seize this opportunity, as the future of the Court may depend on it.

ICC APPEALS CHAMBER CONFIRMS THE ADMISSIBILITY OF CASES IN THE SITUATION OF KENYA

On August 30, 2011, the ICC Appeals Chamber confirmed the admissibility of *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* and *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*. These decisions underscore the ICC's commitment to the principle of complementarity as outlined in Article 17(1)(a) of the Rome Statute, the founding document of the Court. Under Article 17, the Court may hear a case only after finding that a State with domestic jurisdiction is unwilling or unable to investigate or prosecute.

On March 31, 2010, Pre-Trial Chamber II granted the Office of the Prosecutor's (OTP) request to open an investigation *proprio motu* ("by its own volition") into alleged crimes against humanity in Kenya, committed during the post-election violence that left approximately 1,100 people dead, 35,000 injured, and up to 600,000 forcibly displaced in 2007-2008. On March 8, 2011, Pre-Trial Chamber II issued sum-

mons to appear for six Kenyan nationals accused of crimes against humanity under Article 7(1) of the Rome Statute.

On March 31, 2011, the government of Kenya, a State Party to the Rome Statute since 2005, filed applications challenging the admissibility of both cases. On May 30, 2011, Pre-Trial Chamber II issued rejections to these applications, and on June 6, 2011, the Kenyan government filed an appeal, citing Article 17(1)(a) of the Rome Statute. In filing its appeal, the Kenyan government argued that the Court had applied the incorrect standard to determine whether Kenya was fulfilling its duty to investigate the case under Article 17(1)(a), and that the Court had ignored or misinterpreted evidence that investigations were ongoing in Kenya.

On August 30, 2011, the Appeals Chamber rejected the appeal and confirmed the ruling of Pre-Trial Chamber II. In clarifying Article 17(1)(a), the Court ruled that the standard used to determine whether a case is being genuinely investigated depends on the stage of the proceedings. After issuing an arrest warrant or summons to appear, the Court applies the “same person/same conduct” test, which ascertains whether the state has itself taken concrete steps to determine whether the same individual is responsible for substantially the same conduct as alleged in the case before the ICC. In the present case, the Court found that the Kenyan government had failed to demonstrate that it had taken specific and concrete steps to investigate the same individual and the same conduct, adding: “It is not sufficient merely to assert that investigations are ongoing.”

The Appeals Chamber’s decision is thus an affirmation of the principle of complementarity and a clear declaration that both cases will proceed within the jurisdiction of the ICC. The Kenyan Section of the International Commission of Jurists has always supported ICC control of proceedings, arguing that Kenya needs to address issues such as poor political leadership, judicial and police reforms, and the need for a more robust witness protection program before local justice mechanisms would be capable of trying these cases.

In its admissibility challenge, the Kenyan government addressed many of these issues by referencing reforms codified in the new Constitution, among them a Bill of Rights designed to strengthen

fair trial rights, the creation of new offices and procedures to ensure judicial independence, and the inclusion of Rome Statute crimes in national jurisdiction. The government also laid out plans for a bottom-up investigative process that would focus first on suspects at a lower level, and then work its way up to the individuals charged before the ICC. Though the Pre-Trial Chamber II and the Appeals Chamber welcomed these measures, they stated that neither reforms nor plans for future investigations met the requirements to prove *actual* ongoing investigations of the same individuals and for the same conduct.

The Court’s decision confirming the admissibility of both cases in the situation in Kenya furthers the Court’s goal of providing an impartial forum for prosecution when national courts are found unwilling or unable to do so. To effectively fill this role, the Court’s responsibility extends beyond the proceedings to ensuring that the restorative effects of justice reach geographically distant victims and affected communities. With Kenya’s 2012 elections approaching, the proceedings send a strong message to potential perpetrators of violence and to the international community at large that the ICC is standing by to investigate and, if necessary, prosecute should Kenya again experience violence. The principle of complementarity allows for the truth behind alleged crimes to be revealed, one way or another.

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AD HOC TRIBUNALS

REPUBLIC OF RWANDA RECEIVES FIRST REFERRAL CASE FROM ICTR

On June 28, 2011, the United Nations International Criminal Tribunal for Rwanda (ICTR) announced its referral of the first war crimes case, that of Jean-Bosco Uwinkindi, to the Republic of Rwanda. This comes after many years of determined efforts by the Rwandan government to create an impartial court system that is capable of detaining, representing, and trying indicted persons under internationally recognized standards. While the referral is not a *carte blanche* endorsement of the Rwandan judicial system, it indicates cautious approval of Rwanda’s efforts thus far

to align its judicial system to international standards, and will be a litmus test for future referrals, which could ease the case-load of the ICTR in compliance with the goals of its Completion Strategy.

The ICTR modeled its referral process after the International Criminal Tribunal for the former Yugoslavia (ICTY), which has successfully referred thirteen cases to national jurisdictions. As set forth in UN Resolution 1503 (2003), a culminating element of the ICTR’s Completion Strategy is empowering national judicial systems to promote the rule of law. When a state maintains a level of juridical competence that protects the rights of the accused, per Article 20 of the ICTR Statute, the ICTR may facilitate the transfer the cases of intermediate and lower-rank individuals. Article 20 requires that the accused have equality before the court, a fair and public hearing, a presumption of innocence, and minimum guarantees of fairness during trial. The referral process then falls under Rule 11 *bis* of the Rules of Procedure and Evidence for the ICTR, which requires that a specially designated Trial Chamber assess the state’s compliance with Article 20. The state must have a penal code and penalty structure in line with ICTR standards, which includes prohibiting the death penalty for all referred cases, protecting witnesses, and providing adequate detention facilities. After granting a referral order, the ICTR transfers prosecution materials and the accused to the state, and may order observers to monitor and report on the proceedings and facilities, revoking the referral at any time prior to judgment if necessary.

To aid in the *Uwinkindi* referral decision, the ICTR Trial Chamber accepted *amicus curiae* briefs from the Rwandan Government and several non-governmental organizations. The organizations expressed concerns that Rwandan practices do not always respect written law. For example, in a radio interview after *Uwinkindi*’s arrest, Rwanda’s Minister of Justice violated *Uwinkindi*’s right to presumption of innocence, saying he “would be a big catch” since he was “high up in the hierarchy” for planning and executing genocide. Further, the briefs noted that the public announcement of *Uwinkindi*’s conviction in absentia by a Rwandan *Gacaca* Court in 2009 would make witnesses reluctant to testify, even though the conviction was vacated. These concerns are particularly

relevant, as five prior ICTR referral applications were denied for similar concerns, including capital punishment, detention conditions, and witness protection.

However, the *amicus* briefs also illustrate Rwanda's significant leaps forward. In 2007, Rwanda abolished the death penalty, and has since adopted and amended Transfer Laws for accepting cases from the ICTR, according the accused a presumption of innocence, bringing detention facilities in line with UN General Assembly Resolution 43/173, and establishing witness protection standards. Two witness protection programs now provide immunity for testimony. Some witnesses still express fear of being targeted should they testify, but they now have the option to testify via video link, deposition, or before a judge in another state.

These new witness protection measures reflect a reinforced standard of judicial fairness, providing for valuable testimony that might otherwise be unavailable for fear of reprisal. Moreover, Rwanda can now draw from its own experience with genocide trials in its local *Gacaca* courts and its High Court.

While Rwanda must continue to address the concerns of the *amicus* briefs, the ICTR is satisfied that the new measures will ensure Uwinkindi has a fair trial. The African Commission on Human and Peoples' Rights, an independent organization affirmed by the Trial Chambers, will monitor the effectiveness of the new measures throughout the trial, ideally mitigating the risk of an unfair trial. In their own *amicus* brief, the Rwandan Government states that until the Transfer Laws have been tested by cases from the ICTR, they deserve a presumption of good faith, and this is exactly what the ICTR has given them.

FINAL ICTY FUGITIVE CAPTURED: WHAT'S NEXT?

The July 20, 2011 announcement of the arrest of Goran Hadži, the last of 161 persons indicted by the International Criminal Tribunal for the Former Yugoslavia (ICTY), marks a turning point in the Tribunal's mission. The Tribunal was established as an *ad hoc* judiciary, contingent upon the restoration of peace in the region in accordance with United Nations (UN) Security Council Resolution 803 (1993). Accordingly, in response to the

demonstrated judicial competence of the countries that emerged from the former Yugoslavia, the ICTY began to implement its Completion Strategy in 2003, no longer adding cases to its docket after 2004. The Completion Strategy, as adopted by the UN Security Council, requires that the ICTY focus its efforts on the formidable task of building in-country judicial capacity, working with and dependent on the national judiciaries.

Passing the torch of the ICTY to countries in the former Yugoslavia is a two-pronged effort. First, as outlined in UN Resolution 1534 (2004), the ICTY and the international community must work to build the capacity of national courts to try war crimes cases fairly and effectively. Intricately bound with this task is the second: the transfer of the vast amount of legal documentation, evidence, rules of evidence and procedure, and specialized experience from the ICTY to the countries of the former Yugoslavia.

As set forth in UN Resolution 1503 (2003), a culminating element of the ICTR's Completion Strategy is empowering national judicial systems to promote the rule of law. The principal effort in this regard is the War Crimes Justice Project (WCJP). A joint effort of the ICTY, the Office for Democratic Institutions and Human Rights at the Organization for Security and Co-operation in Europe (OSCE/ODIHR), and the United Nations Interregional Crime and Justice Research Institute (UNICRI), with 4 million of funding from the European Union (EU), the WCJP formed in late 2010 after a nine-month needs assessment to facilitate the transfer of the ICTY's skills and resources. To meet the identified needs, the WCJP performs several functions. First, it translates key proceedings from the ICTY into Bosnian, Croatian, and Serbian. In total, 60,000 pages will be translated by the end of 2011. Second, the WCJP has coordinated thirty-one professional development sessions in the former Yugoslavia for legal professionals, judges, and prosecutors on various jurisprudential principles embraced by the Tribunal, while acquainting the countries with the Tribunal's legal research tools. The ICTY has also hosted local forums for judges to exchange expertise on legal challenges and procedural tools. Finally, the WCJP is working with the OSCE to develop country-specific curricula on international humanitarian law

tailored to each legal system, training instructors to continue the WCJP's work autonomously. Ultimately, the WCJP will make a compilation of legal precedent available for war crimes trials in the former Yugoslavia, and provide the tools and expertise necessary for local professionals to use it effectively.

Transferring the work of the ICTY both demands and enables a competent national judiciary. Several specialized chambers for war crimes prosecution within the former Yugoslavia now provide direct counterparts with which the ICTY can work. The Court of Bosnia and Herzegovina, with the cooperation of the ICTY, formed a War Crimes Chamber that has successfully tried and convicted war criminals under its own criminal code. Ten indicted individuals have been transferred to this court from the ICTY. Croatia is still undergoing massive judicial reform, but has made considerable progress, establishing war crimes chambers in county courts. In 2003, Croatia adopted new witness protection laws, and in 2005 it added a department in its Ministry of Justice to work with witnesses of war crimes. To date, Croatia has tried one transferred case from the ICTY, and it is working with the ICTY to prosecute others locally. Serbia has also made significant progress, setting up a War Crimes Chamber, and working with the ICTY on transfer cases. Through the Office of the War Crimes Prosecutor, Serbia now issues its own indictments and convictions, successfully prosecuting 383 persons to date.

The greatest substantive contribution of the ICTY to the former Yugoslavia and the rest of the world is the vast amount of precedent for international war crimes adjudication. The international community, and in particular the International Criminal Court and other *ad hoc* tribunals, will continue to interpret and build on this precedent. However, the separate procedural contribution of the ICTY exemplified in these capacity building efforts is a success in its own right. It will ultimately increase trust in the competence of national judiciaries to try war criminals under the same standards of fairness and impartiality promoted by the ICTY.

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**JUDGMENT SUMMARIES: INTERNATIONAL
CRIMINAL TRIBUNAL FOR RWANDA**

**THE PROSECUTOR V. NYIRAMASUHUKO,
ET AL., TRIAL JUDGMENT, CASE NO.
ICTR-98-42-T**

On June 24, 2011, Trial Chamber II of the International Criminal Tribunal for Rwanda issued its approximately 1500 page judgment in the case commonly known as the “Butare Trial,” against six Rwandans who held positions of authority in the *préfecture* of Butare in Rwanda during the 1994 genocide. The six accused—Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziriyayo, Joseph Kanyabashi, and Elie Ndayambaje—was each convicted of genocide based on his or her role in helping to formulate and implement a government plan to massacre the Tutsis in Butare, one of the most populated *préfectures* in Rwanda, and the area with the highest percentage of Tutsis. Among the other charges on which the accused were convicted were conspiracy to commit genocide (Nyiramasuhuko), direct and public incitement to commit genocide (Nteziriyayo, Kanyabashi, and Ndayambaje), extermination as a crime against humanity (Nyiramasuhuko, Ntahobali, Kanyabashi, and Ndayambaje), rape as a crime against humanity (Nyiramasuhuko and Ntahobali), persecution as a crime against humanity (Nyiramasuhuko, Ntahobali, Nsabimana, Kanyabashi, and Ndayambaje), violence to life, health, and the physical or mental well-being of persons as a war crime (Nyiramasuhuko, Nsabimana, Kanyabashi, and Ndayambaje), and outrages upon personal dignity as a war crime (Nyiramasuhuko and Ntahobali). Each was acquitted of other inhumane acts as a crime against humanity, either because the underlying acts forming the basis for the charge fell “squarely within other crimes against humanity” for which the accused was convicted, or did not rise to the level of crimes against humanity. The Chamber sentenced Nyiramasuhuko, Ntahobali, and Ndayambaje to life imprisonment, Nsabimana to twenty-five years’ imprisonment, Nteziriyayo to thirty years’ imprisonment, and Kanyabashi to thirty-five years’ imprisonment.

The Butare Trial and judgment are notable for a number of reasons. First, the trial was particularly lengthy and complex,

lasting ten years and involving the creation of more than 125,000 transcript pages, the production of approximately 13,000 pages of documents into evidence, and the testimony of 189 witnesses. Due to the lengthy nature of the trial, several of the accused either filed separate motions with the Chamber arguing that their rights to be tried without undue delay had been violated, or raised this claim in their closing arguments to the Chamber. However, the Chamber dismissed these claims, explaining that what constitutes “undue” delay is determined on case-by-case basis by looking at the length of delay, the complexity of proceedings, the conduct of parties, the conduct of legal authorities, and any prejudice which accrued to the accused as a result. Referencing its decisions in *Nahimana, et al.* and *Bagosara, et al.*, in which the Chamber had found that detention of more than seven-and-a-half years and eleven years, respectively, were not “undue” because of the complexity of the cases, the Chamber reached a similar conclusion with respect to the Butare Trial, stressing not only the large number of witnesses, but also the fact that six different defense teams had to cross-examine each witness and present its own case.

Another notable feature of the Butare Trial and judgment is that Pauline Nyiramasuhuko, the former Minister of Family and Women’s Development in Rwanda, was the first female accused to be brought before any international criminal tribunal, as well as the first woman to be convicted of genocide and rape—both as a crime against humanity and as the war crime of outrages upon personal dignity—in any international criminal tribunal. In regard to the charges of rape, the Trial Chamber convicted both Nyiramasuhuko and her son, Ntahobali, who was a student and part-time manager of Hotel Ihuliro during the 1994 genocide, of bearing superior responsibility for the rapes of a number of Tutsi refugees who had taken shelter at the Butare *Préfecture* Office (BPO). Specifically, the Chamber found that Nyiramasuhuko brought *Interhamwe* soldiers who were under her effective control to the BPO and, in many cases, ordered the soldiers to rape Tutsi women before loading them onto trucks and taking them to various places in Butare to be killed. Given the fact that the Chamber found that the evidence established Nyiramasuhuko had ordered the rapes, the Chamber expressed

the view that the Prosecution had made a “serious omission” by failing to charge her with both direct and superior responsibility for rape. By contrast, Ntahobali was convicted of rape as a crime against humanity and as the war crime of outrages upon personal dignity not only as a superior, but also for his role as a principal perpetrator of rapes against several women, and for ordering and aiding and abetting the rape and gang rapes of Tutsi women. The Chamber also repeatedly admonished the Prosecution for its failure to adequately plead rape as genocide, noting that while rape featured prominently in the Prosecution’s Indictment, it was pled only as a crime against humanity and the war crime of outrages upon personal dignity. Furthermore, the Chamber found that the Prosecution failed to cure the defective pleading through its Pre-Trial Brief and Opening Statement. Thus, although the Chamber found that the evidence established that the bodily and mental harm inflicted by the rapes perpetrated or supported by the accused was “of such a serious nature as to threaten the destruction in whole or in part of the Tutsi ethnic group,” it could not consider the acts of rape in support of the charges of genocide. Notably, the Chamber did discuss the evidence presented at trial regarding acts of rape in the course of its findings on genocide in order to convey the entire set of facts in a coherent fashion, but noted each time that the rapes were not taken into account when assessing genocide.

Yet another interesting facet of the Butare Trial judgment is the Trial Chamber’s finding that Nsabimana, who was *préfet* of Butare during the relevant events, aided and abetted crimes committed at the Butare *Préfecture* Office through his failure to fulfill his legal duty to prevent the crimes. Specifically, the Chamber convicted Nsabimana of aiding and abetting genocide, extermination and persecution as crimes against humanity, and the war crime of violence to life, health, and the physical or mental well-being of persons based on its finding that he had a legal duty to prevent the killing of Tutsis taking refuge at the BPO. The Chamber began its analysis of Nsabimana’s liability by stating that an accused may be responsible for aiding and abetting in two different ways: (i) by positive acts, including providing tacit approval and encouragement; or (ii) by omission, namely failing to discharge

a legal duty to act. While the first form of aiding and abetting liability seems to require the presence of the accused at or near the scene of the crime, the Chamber explained, the latter only requires that the accused had the ability to fulfill his or her duty; that the failure of the accused to do so assisted, encouraged, or lent moral support to the perpetration of a crime; and that the failure to act had a substantial impact on the realization of that crime. Thus, the fact that Nsabimana was not present at the BPO when the attacks that formed the basis for the charges against him were committed did not preclude the Chamber from finding him responsible as an aider and abettor. In terms of his legal obligation to prevent the attacks at the BPO, the Chamber first explained that the Rwandan Penal Code imposes a general obligation on every citizen to provide assistance to persons in danger and provides that failure to do so is a criminal offense. While recognizing that the Code also provides that a risk to oneself may serve as justification for a failure to act, the Chamber held that the danger to any one person in a position of authority does not outweigh the violence suffered by thousands of people that “affects... [h]umanity as a whole.” The Chamber also found that Rwandan domestic law required Nsabimana, as *préfet*, to ensure the security of people within the Butare *préfecture*. Lastly, the Chamber noted that the laws and customs of war imposed a legal duty to protect civilians against acts or threats of violence, citing in particular to provisions of Additional Protocol II to the Geneva Conventions. With respect to Nsabimana’s assistance to, and substantial effect on, the perpetration of crimes at the BPO, the Chamber noted that many people took refuge at the BPO precisely because they believed that the *préfet* would help them, but in reality, Nsabimana not only failed to intervene, but directly declined requests for assistance. The Chamber also stressed that, when Nsabimana did eventually requisition forces to stand guard at the BPO in early-to mid-June 1994, further attacks were prevented. Had he taken such action earlier in time, the Chamber concluded, he could have prevented, at least in part, crimes that the Chamber characterized as “among the worst” recounted before the ICTR.

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Anne Cleary, Assistant Director of the War Crimes Research Office, edited this summary for the Human Rights Brief.

THE PROSECUTOR V. JEAN-BAPTISTE GATETE, TRIAL JUDGMENT, CASE NO. ICTR-2000-61-T

Trial Chamber III of the International Criminal Tribunal for Rwanda issued its judgment in the case against Jean-Baptiste Gatete on March 31, 2011. Gatete, who was a prominent member of the Hutu-dominated National Revolutionary Movement for Development of Rwanda and served as the director of the Ministry of Women and Family Affairs during the country’s 1994 genocide, was found guilty of genocide and extermination as a crime against humanity, resulting in a single sentence of life imprisonment. The Chamber ruled that he was responsible for the deaths of hundreds—if not thousands—of Rwanda’s Tutsis based on his role organizing and coordinating mass killings by distributing weapons and ordering members of the *Interahamwe*, a civilian militia, to carry out extensive assaults on Tutsis. Although the Prosecution also charged Gatete with rape as a crime against humanity based on a number of alleged incidents in which the accused ordered members of the *Interahamwe* to rape Tutsis, the Trial Chamber determined with respect to each of these incidents that the Prosecution had failed to establish Gatete’s responsibility for the rapes beyond a reasonable doubt and thus Gatete was acquitted of rape as a crime against humanity.

Along with challenging the Prosecution’s evidence relating to the charges against him, Gatete’s Defense team raised a number of challenges relating to the fairness of proceedings. First, the Defense argued that Gatete’s right to trial without undue delay had been violated, given that he was arrested on September 11, 2002 and over seven years lapsed before his trial commenced on October 20, 2009. In addressing this challenge, the Chamber noted that the right to be tried without undue delay is established by Article 20 (4)(c) of the statute of the ICTR and that a number of factors are relevant in determining whether a delay was undue, including: “(a) the length of the delay; (b) the complexity of the proceedings...; (c) the conduct of the parties; (d) the conduct of the authorities involved; and (e) the prejudice to the

accused...” The Chamber weighs these factors on a case-by-case basis, and considers the totality of circumstances surrounding the undue delay. Turning to the case before it, the Chamber first recognized that the pre-trial delay of over seven years was substantial. However, the Chamber balanced the length of the delay with the other factors mentioned above. Regarding the complexity of the proceedings, the Chamber considered multiple sub-factors including “the number of accused, the number of witnesses, the quantity of the evidence, and the complexity of the facts and of the law.” While the case involved only one accused, the Chamber stressed that, together, the Prosecution and Defense called forty-nine witnesses before the Chamber and presented 146 exhibits. There was also an evidentiary on-site visit to Rwanda. Moreover, the Chamber noted that the allegations of genocide, complicity in genocide, conspiracy to commit genocide, and the crimes against humanity of extermination, murder, and rape involved complex issues of law and fact. Moreover, while the Chamber did cite to “instances of delay on the part of the Prosecution” for which the Chamber found no justification, it also determined that the accused suffered no prejudice as a result of these delays. Indeed, in the opinion of the Chamber, the Defense’s failure to challenge the length of proceedings until its Closing Brief demonstrated that there was minimal—if any—prejudice as a consequence of the delay. Finally, the Chamber stressed that, once the trial commenced, it was conducted extremely expeditiously. In sum, the Chamber ruled that, after considering the above factors, Gatete’s right to trial without undue delay was not violated.

The Defense also argued that the disclosure of the identities of a number of protected witnesses only thirty days prior to the start of trial adversely affected Gatete’s ability to prepare his defence pursuant to Article 20(4)(b) of the ICTR Statute. In response, the Trial Chamber noted not only that it had a statutory duty to “provide for the protection of victims and witnesses,” but also that the Pre-Trial Chamber had determined that the Prosecution had presented “persuasive evidence of the volatile security situation in Rwanda and of potential threats against Rwandans living in other countries, which could give rise to a justified and real fear that disclosure of their participation in the Tribunal’s proceedings would threaten their safety and

security.” The Chamber also stressed that the Defense was not alleging that the decision to grant protective measures was an abuse of the Pre-Trial Chamber’s discretion. Finally, the Chamber noted that the Defense had failed to demonstrate how the fact that the identities were not disclosed until thirty days before the start of trial harmed its preparation. As a result, the Chamber dismissed the claim.

Lastly, the Defense argued that Gatete’s right to a fair trial was prejudiced by the fact that eight out of the thirty days of trial proceedings were conducted in the absence of one of the three Trial Chamber judges. While recognizing that Rule 15*bis* of the ICTR’s Rules of Procedure and Evidence permits the Trial Chamber to hold proceedings in the absence of a judge where the interests of justice require, the Defense argued that Gatete suffered prejudice because: (i) the testimony of twelve witnesses had to be viewed by the absent judge by way of video-recording, which does not allow for the same assessment of a witness’s credibility as live testimony; and (ii) the absence of one judge “has an impact on the level of questioning from the Bench during trial.” The Trial Chamber rejected the claim of prejudice, however, noting that the Defense had not demonstrated that the remaining judges of the Chamber abused their discretion under Rule 15*bis* in determining that the interests of justice required a continuation of the trial. Furthermore, the Chamber noted that, while the preference is for each judge to hear live testimony from witnesses, there is no absolute requirement that testimony be presented in such a manner, and in any event, a witness’s in-court demeanor is not the sole factor relevant to determining credibility. Finally, the Chamber highlighted the fact that the Defense had not raised objections to the continuation of proceedings pursuant to Rule 15*bis* at the time and that it did not move to recall any witnesses following the return of the absent judge.

Having dismissed the Defense’s claims regarding Gatete’s fair trial rights, the Chamber went on to evaluate the charges against Gatete and determined, as mentioned above, that he bore responsibility for the crimes of genocide and extermination as a crime against humanity. In sentencing Gatete, the Chamber considered the gravity of the offenses with which he was convicted, as well as aggravating and miti-

gating circumstances, and decided upon a single sentence of thirty years.

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THARCISSE RENZAHO V. THE PROSECUTOR, APPEALS JUDGMENT, CASE NO. ICTR-97-31-A

On April 1, 2011, the Appeals Chamber of the International Criminal Tribunal for Rwanda issued its judgment in the case against Tharcisse Renzaho, *préfet* of Kigali-Ville *préfecture* and a colonel in the Rwandan army during the 1994 genocide. The Trial Chamber had convicted Renzaho of genocide, murder and rape as crimes against humanity, and murder and rape as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, sentencing him to life imprisonment. Although the Appeals Chamber granted two of Renzaho’s thirteen grounds of appeal, it affirmed the Trial Chamber’s life sentence.

The first of Renzaho’s two successful grounds of appeal related to the Trial Chamber’s decision to convict him of genocide, crimes against humanity, and war crimes on the basis of his superior responsibility for repeated acts of rape committed against three women by *Interahamwe*, policemen, and soldiers in the Rugenge sector of Kigali-Ville. Specifically, Renzaho argued that the Trial Chamber convicted him of on the basis of facts not properly pleaded in the Indictment, which, according to Renzaho, lacked detailed information regarding the dates, locations, and names of the victims and perpetrators underlying the Prosecution’s rape charges. The Prosecution contended that although the Rugenge sector was not expressly mentioned in the Indictment, the Indictment alleged that between April and July 1994, Renzaho’s subordinates raped Tutsi women and girls *throughout* Kigali-Ville and forced them to perform sexual acts in exchange for their safety. Additionally, the Prosecution argued that Renzaho received clear, consistent, and timely information detailing the factual basis of the rape charges against him by way of the

Prosecution’s Pre-Trial Brief. In reviewing these claims, the Appeals Chamber began by recalling that, because Renzaho was charged as a superior under Article 6(3) of the Statute of the Tribunal, four categories of the material facts must have been pleaded in the Indictment: (i) facts establishing that Renzaho was the superior of sufficiently identified subordinates over whom he had effective control and for whose acts he was alleged to be responsible; (ii) facts describing the criminal acts committed by those for whom Renzaho was alleged to be responsible; (iii) facts establishing that the accused knew or had reason to know of the criminal acts; and (iv) facts establishing that Renzaho failed to take necessary and reasonable measures to prevent the criminal acts or to punish the persons who committed them. Ultimately, the Appeals Chamber determined that the Indictment was defective because it failed to plead the facts establishing that Renzaho knew or had reason to know of the rapes forming the basis for the charges. It also found that the Prosecution’s Pre-Trial Brief failed to cure the defect because it did not clearly indicate that Renzaho’s encouragement of the rapes was the key fact that formed the basis for his criminal liability as a superior. Finally, the Appeals Chamber concluded that the defective pleading constituted a prejudice against Renzaho because his ability to prepare his defense was materially impaired. During the trial, Renzaho’s defense did not understand that the encouragement of the rapes was a key element to the Prosecution’s case and, thus, did not appropriately object to a witness’s testimony stating that Renzaho encouraged the rapes. Therefore, the Appeals Chamber held that the Trial Chamber erred in convicting Renzaho and reversed his convictions for genocide, crimes against humanity, and war crimes to the extent the convictions were based on these rapes.

The Appeals Chamber, by majority, also partially granted Renzaho’s fifth ground of appeal, which raised several challenges to the Trial Chamber’s finding that Renzaho was guilty of genocide based on killings that occurred at roadblocks set up throughout Kigali-Ville. In particular, a majority of the Appeals Chamber was persuaded by Renzaho’s challenge to the Trial Chamber’s finding, by way of inference, that he ordered the killing of Tutsis at roadblocks. The Trial Chamber had reached this conclusion, despite the

fact that there was no explicit evidence that Renzaho had ordered the killings, by noting that the evidence established that Renzaho had ordered the establishment of the roadblocks, facilitated the acquisition of weapons for distribution to the civilian population, and sanctioned the killings at the roadblocks. Based on this evidence, the Trial Chamber concluded that Renzaho “must have equally” ordered the killings at roadblocks. In reviewing this finding, the Appeals Chamber first recalled that, while ordering, as a mode of responsibility, can be inferred from circumstantial evidence, it must be the *only* reasonable inference available. Here, the majority held that the Trial Chamber failed to explain how the conclusion that Renzaho gave an order to kill Tutsis at roadblocks was the only reasonable inference to draw from the evidence. Furthermore, the majority noted, the conclusion that Renzaho gave an order to kill at the roadblocks would be an insufficient basis on which to base a conviction for ordering, as the Trial Chamber made no findings “concerning when or where Renzaho gave the order, to whom or to what category of perpetrators he gave the order, and whether Renzaho was in a position of authority *vis-à-vis* the recipient.” Hence, while upholding the

Trial Chamber’s conviction of Renzaho of genocide based on aiding and abetting the killings at the roadblocks, the majority reversed the lower court’s conviction for genocide based on ordering these same killings.

Judge Güney and Judge Pocar dissented on this point. Judge Güney stated that although he agreed that the conviction was not secured for reasons put forth by the majority, he believed that other factual findings in the Trial Judgment supported the conviction of genocide for ordering the killing at roadblocks. He argued that the Trial Chamber found “beyond reasonable doubt” that Renzaho ordered the establishment of roadblocks during April 1994, was aware of the likelihood that killings would be committed there, and shared the “genocidal intent of the assailants at roadblocks.” For his part, Judge Pocar disagreed with both the reasoning and the conclusion of the majority opinion. He believed the majority ignored the fact that Renzaho ordered the establishment of roadblocks and made other public statements knowing that the continued killing of Tutsis was a likely outcome. Based on these facts, Judge Pocar stated that the Trial Chamber determined that Renzaho acted with knowledge

of the genocidal intent of the assailants at roadblocks, an intent Renzaho also shared, and had not erred in its conviction of Renzaho based on his role in ordering the killings of Tutsis at roadblocks.

In terms of sentencing, the Appeals Chamber noted that its reversals of the Trial Chamber’s convictions for genocide, crimes against humanity, and war crimes based on acts of rape and for genocide based on the ordering of killings of Tutsis at roadblocks “concern[ed] very serious crimes” and that, in some cases, the Appeals Chamber has “considered reversals as reason to review and reduce the sentence.” However, noting that it had affirmed Renzaho’s convictions for genocide, murder as a crime against humanity, and murder as a war crime based on other acts, the Appeals Chamber concluded that its reversals did not impact the sentence imposed by the Trial Chamber.

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INTERNATIONALIZED TRIBUNALS

THE SPECIAL TRIBUNAL FOR LEBANON DEFINES TERRORISM

On May 30, 2007, the United Nations, by U.N. Security Council Resolution 1757, convened the Special Tribunal for Lebanon (STL) to prosecute individuals accused of committing the attacks on February 14, 2005 that killed former Lebanese Prime Minister Rafiq Hariri and others. Article 2 of Resolution 1757 specified that the tribunal must apply the Lebanese Criminal Code for crimes of terrorism. Although the STL is mandated to apply Lebanese law in its proceedings, the Appeals Chamber of the STL issued an interlocutory decision in which it held that the STL could apply international law related to the definition of terrorism to which Lebanon is bound. The Appeals Chamber referenced the Arab Convention for the Suppression of Terrorism (Convention), articulated a customary international definition of terrorism, and explained how the STL is not

limited by Lebanese case law as it applies the Lebanese Criminal Code related to terrorism. This is the first internationalized tribunal to try crimes of terrorism. Thus, the decisions regarding what constitutes a crime of terrorism could impact how other countries prosecute individuals accused of committing acts of terrorism.

Article 314 of the Lebanese Criminal Code defines terrorist acts as “acts intended to cause a state of terror and committed by means liable to create a public danger such as explosive devices, inflammable materials, toxic or corrosive products and infectious or microbial agents.” Thus, the Lebanese code narrowly defines a terrorist act as one requiring use of some means likely to create a public danger. For example, a murder committed with the intention to terrorize the population may not meet the statute’s requirements if the court decides that the means used did not create a public danger.

In articulating international definitions of terrorism, the STL looks to the Arab

Convention, to which Lebanon is a State Party, as well as customary international law. The Convention does not specify the means of a terrorist act, but does assert that the act must be violent in nature. The STL then turns to other international law to articulate a customary definition of terrorism by looking to state practice and international treaties. The STL states that, through the lens of customary international law, an act is considered terrorism if, in times of peace, the actor creates a public danger with the intent to spread fear, and the act has a transnational element or effect. By bringing the Lebanese and international definitions of terrorism together, and by regarding the list of means enumerated in the Lebanese Criminal Code as non-inclusive, the court broadly interprets Lebanon’s means requirement. Lebanon’s requirement of a danger to the public is still part of the definition of a terrorist act that the STL will apply, but the danger created need not arise from the specific means used to commit the terrorist act. Rather, the danger can be the violence that the act has

the potential to encourage and create. Thus, the STL will interpret an act of terrorism to require an intentional commission of an act through any means likely to create a public danger, and the intent to create and cause a state of fear and terror.

While the STL has yet to hear a case, its interlocutory decision defining terrorism and subsequent cases applying this definition could have a lasting impact both in Lebanon and the greater international community. As this will be the first instance in which an act of terrorism is tried in an internationalized venue, the future opinions issued by the STL could become important persuasive authority for other Lebanese courts, and for other international and domestic courts, prosecuting acts of terrorism. The international community has struggled to clearly define terrorism, and has instead relied on various anti-terrorism conventions. The definition of terrorism articulated by the STL could serve as a “gap filler” for other international bodies as they also wrestle with the challenge of defining terrorism and the legal consequences of such a definition. As trials commence, the application of the STL’s definition will further clarify the legal requirements of terrorism, and the ramifications for both the prosecution and defense.

PROCEEDINGS IN THE ECCC: FITNESS TO STAND TRIAL DELAYS CASE 002

The Extraordinary Chambers in the Courts of Cambodia (ECCC) is currently conducting a series of hearings regarding the fitness to stand trial of some of the defendants in Case 002. Case 002 involves four leaders from the Khmer Rouge regime of 1975 to 1979, Noun Chea, Ieng Sary, Khieu Samphan, and Ieng Thirith. They have been indicted on multiple charges, including crimes against humanity and genocide. The court’s review of Noun Chea, Ieng Sary, and Ieng Thirith’s fitness to stand trial has significantly delayed the start of the trial. While a defendant has a right to be able to competently participate in his or her trial, the inability to try violators of human rights due to health concerns may undermine victims’ access to justice.

Rule 81 of the ECCC states that the defendant has a right to be present at his or her trial. Furthermore, the Cambodian Constitution embraces the UN International Covenant on Civil and Political Rights,

which requires in Article 14 that defendants be able to participate in their own trial. A defendant who is mentally or physically incapable cannot stand trial. The ECCC has ruled that a defendant may request a health evaluation, as per *Prosecutor v. Strugar*, a decision of the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY). In *Strugar*, the ICTY held that a certain level of mental cognizance is required for a defendant to “effectively exercise” his procedural rights. Thus, the purpose of these fitness hearings is to determine if a defendant can stand trial. If the court finds the defendant unfit, the decisions of the ICTY can help guide the court in determining how to handle permanently unfit defendants.

Concerns regarding the defendants’ health were first raised in March 2008 when Noun Chea requested the appointment of an expert to gauge his fitness to stand trial. The court denied this motion on the grounds that the defense did not present enough evidence to warrant the appointment of an expert. Internal Rule 32 of the ECCC states that the court may appoint an expert to determine if a defendant is “physically and mentally fit to stand trial” because the defendant has a procedural right to be capable of understanding and present for the litigation.

In 2011, Noun Chea, joined with Ieng Thirith and Ieng Sary, again requested the appointment of an expert to evaluate their fitness to stand trial. The order was granted and Dr. John Campbell, a geriatrician from New Zealand, evaluated the health and fitness of both Ieng Thirith and Noun Chea, while Ieng Sary was denied an evaluation. Dr. John Campbell examined Noun Chea and Ieng Thirith and appeared before the court from August 29 – August 31, 2011 to answer questions. While the court has yet to make a final decision on both defendants, Dr. Campbell’s findings will likely weigh heavily in the decision because of the ECCC’s inability to conduct its own thorough health assessment with a full understanding of the medical issues.

Dr. Campbell’s report found Noun Chea fit to stand trial. However, it is likely that the defense will continue to raise health concerns regarding his mental and physical ability. Dr. Campbell’s report on Ieng Thirith states that she is likely suffering from Alzheimer’s disease and short-term memory loss, and recommends that

she undergo further psychiatric testing to determine if she is fit to stand trial. He does not think she is currently fit to stand trial, and he believes she is unlikely to improve. Once affirmed by the Supreme Court Chamber, a decision that a defendant is unfit to stand trial is final and terminates proceedings against the defendant. Thus, there is a substantial likelihood that Ieng Thirith’s trial will never progress past the pre-trial stage.

If Ieng Thirith is declared permanently unfit, the ECCC will face a unique decision, with jurisprudential repercussions not merely for the ECCC itself, but for the entire international criminal justice landscape. Unlike in *Strugar*, where the defendant declared unfit died three months later from terminal cancer, Ieng Thirith’s Alzheimer’s is permanent, but not terminal; she could survive for years rather than months. If unfit, the court is likely to release her to a health facility or to her family, with restrictions placed on her movement. However, it is possible she will outlive the mandate of the ECCC, in which case it is unclear if any potential restrictions placed on her would continue to have a legal effect.

The trial against all four defendants will start in late November. However, if proceedings against Ieng Thirith are halted, there may be no redress for the victims of Khmer Rouge’s brutal regime, many of whom continue to suffer from health issues. Many victims of the Khmer Rouge are in a similar physical and mental condition as Ieng Thirith but do not have access to the same standard of health care. While it is important to balance the rights of the defendant, it is important not to lose sight of the fact that these defendants allegedly led a brutal, genocidal regime whose victims are still suffering ill consequences. While the ECCC strives to respect the rights of the defendants, justice for the victims should not be forgotten.

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