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International Criminal Tribunal for the Former Yugoslavia and for Rwanda

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International Criminal Tribunal for the Former Yugoslavia and for Rwanda

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I. The Former Yugoslavia

The International Criminal Tribunal for the former Yugoslavia (ICTY) has made significant progress in 1998¹ toward punishing the perpetrators of atrocities in the region. During the year, the ICTY found that the prohibition against torture is *ius cogens* and that rape may constitute torture, and it rendered the first international decision on command responsibility since World War II.

A. STATUS OF PROCEEDINGS

In 1998, the activity level of the ICTY rose considerably. As of December 28, 1998, there were fifty-eight accused in twenty-two indictments. Twenty-six indictees are in custody, and one has been provisionally released due to ill health.² Three trials have been completed (two during 1998) and four are ongoing.³ The remaining detainees are in various stages of pretrial proceedings. ICTY trials have yielded five convictions and one acquittal, and appeals are pending

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1. For information regarding the ICTY's earlier years, see Douglas Stringer, *International Criminal Tribunal for the former Yugoslavia*, 31 INT'L LAW. 611 (1997); Monroe Leigh & Maury Shenk, *International Criminal Tribunal for the former Yugoslavia*, 32 INT'L LAW. 509 (1998).

2. See *International Criminal Tribunal for the former Yugoslavia: Fact Sheet* (last modified Jan. 12, 1999) <<http://www.un.org/icty/glance/fact.htm>> [hereinafter *ICTY Fact Sheet*]. Since the inception of the ICTY, 83 individuals have been named in 24 indictments. *See id.* Six accused have died, charges against 18 others have been dropped, one is serving his sentence, and one was acquitted. *See id.* Three new indictments for 7 individuals were handed down and 11 indictees surrendered or were arrested in 1998.

3. *See id.* Completed trials are: Tadic (May 7, 1996 to November 28, 1996); Delalic, Delic, Landzo, and Mucic (the "Celebisi case") (March 10, 1997 to October 15, 1998); and Furundzija (June 8, 1998 to November 12, 1998). *See id.* Ongoing trials are: Aleksovski (commenced January 6, 1998); Blaskic (commenced June 24, 1998); Kupreskic and others (commenced August 17, 1998); and Jelusic (commenced November 30, 1998). *See id.*

in each case.⁴ Two accused have pled guilty to the charges against them: one has been sentenced and transferred to a national prison and one awaits trial on a separate charge.⁵ Two accused died while in custody in 1998.⁶

In light of the increased number of indictees in custody and the pressure on the ICTY to use its resources on those higher up the chain of command (which will be facilitated by the decision on command responsibility in the *Celebisi* case, discussed below), the prosecutor was granted leave to withdraw charges against fourteen indictees in July 1998.⁷ The ICTY also adopted new rules of procedure designed to streamline the trial process,⁸ inaugurated two new courtrooms, and extended courtroom hours to allow for the hearing of more than one case per day.⁹ Three new judges took up office in November, increasing the number of judges to fourteen.¹⁰

The ICTY continues to struggle with the Federal Republic of Yugoslavia (FRY) over turning over indictees in its territory and allowing ICTY investigators into Kosovo. The Security Council voted 14-0, with China abstaining, against the FRY on both issues,¹¹ but the FRY continues to refuse to comply, citing "constitutional and legal obstacles" to extradition and claiming that the ICTY does not have jurisdiction over events in Kosovo.¹²

B. MAJOR LEGAL DEVELOPMENTS

1. *Celebisi and Furundzija—Torture in International Law*

a. The Prohibition of Torture as *Jus Cogens*

The Trial Chambers in both the *Celebisi* and *Furundzija* cases found that torture had attained the status of *jus cogens*.¹³ The court in *Furundzija* stated:

4. See *id.* Tadic was sentenced to 20 years imprisonment. See *id.* Co-defendants Mucic, Delic, and Landzo were sentenced to 7, 20, and 15 years, respectively. Delalic was acquitted and released; the prosecution appealed. See *id.* Furundzija received 10 years. See *International Criminal Tribunal for the former Yugoslavia: Fact Sheet: Furundzija Case* (Dec. 1998) (visited Jan. 11, 1999) <<http://www.un.org/icty/glance/Furund.htm>>.

5. See *ICTY Fact Sheet*, *supra* note 2. Erdomovic was sentenced to five years imprisonment on March 5, 1998, and is serving time in Norway. See *id.* Jeliscic pled guilty to crimes against humanity and violations of the laws and customs of war; however, he is on trial for genocide, and sentencing awaits completion of the trial. See *id.*

6. See *International Criminal Tribunal for the former Yugoslavia: List of Accused in Custody* (last modified Dec. 8, 1998) <<http://www.un.org/icty/glance/list3.htm>>. Dokmanovic committed suicide in his cell, and Kovacevic died of a heart attack in custody. See *id.*

7. See *Prosecutor Re-evaluates All Outstanding Indictments*, ICTY Bulletin No. 21 (July 27, 1998) (visited Jan. 4, 1999) <<http://www.un.org/icty/bulletin21-e/prosec.htm>>. The withdrawals are "not based on any lack of evidence in respect of these accused" but rather on a lack of resources to prosecute. *Id.*

8. See *International Criminal Tribunal for the former Yugoslavia: ICTY Judges Successfully Conclude Review of Judicial Procedures* (July 16, 1998 press release) (visited Jan. 4, 1999) <<http://www.un.org/icty/pressreal/p333-e.htm>>.

9. See *Two More Courtrooms*, ICTY Bulletin No. 20 (Mar. 20, 1998) (visited Jan. 4, 1999) <<http://www.un.org/icty/bulletin/index.htm>>.

10. See *International Criminal Tribunal for the former Yugoslavia: Judge D. Hunt, Judge M. Bennouna and Judge P. Robinson Will Take The Oath on 16 November 1998* (Nov. 13, 1998 press release) (visited Jan. 4, 1999) <<http://www.un.org/icty/pressreal/p363-e.htm>>.

11. See John M. Goshko, *U.N. Council Pushed Kosovo Probe*, WASH. POST, Nov. 18, 1998, at A34.

12. See *Justice Minister Rules Out Extradition of Former Army Officers to The Hague* (BBC television broadcast, Jan. 8, 1999), available in LEXIS, News Library, Cumws File.

13. *Prosecutor v. Delalic, Mucic, Delic and Landzo, Case No. IT-96-21-T, Opinion and Judgment*, ¶ 454 (Nov. 16, 1998) (visited Mar. 25, 1999) <<http://www.un.org/icty/celebici/tce21.htm>> [hereinafter *Celebisi*]; *Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Opinion and Judgment*, ¶ 153 (Dec. 10, 1998) (visited Mar. 25, 1999) <<http://www.un.org/icty/furundzija/tce17.htm>> [hereinafter *Furundzija*].

the principle proscribing torture . . . has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States.¹⁴

b. Accomplice Liability

The Trial Chamber in *Furundzija*¹⁵ also held that an individual may be guilty of torture even if he or she does not physically participate in the infliction of pain: "If an official interrogates a detainee while another person is inflicting severe pain or suffering, the interrogator is as guilty of torture as the person causing the severe pain or suffering, even if he does not in any way physically participate in such infliction."¹⁶ The court distinguished perpetrator liability for torture from liability for aiding and abetting. To be guilty as a perpetrator, the accused must "participate in an integral part of the torture and partake of the purpose behind the torture"—e.g., to obtain information or a confession, or to punish, intimidate, humiliate, coerce or discriminate against the victim or a third person.¹⁷ By contrast, to be guilty as an aider or abettor, the accused must "assist in some way which has a substantial effect on the perpetration of the crime and with knowledge that torture is taking place."¹⁸ *Furundzija* was found guilty as a co-perpetrator of torture and as aider and abettor in outrages upon personal dignity, including rape.¹⁹

c. Rape as Torture

The *Celebisi*²⁰ case represents the first conviction for rape as torture by the ICTY; in this context, "the Trial Chamber wishes to note that there can be no question that acts of rape may constitute torture under customary international law."²¹ In *Celebisi*, the four accused were indicted for atrocities committed at the Celebisi prison camp. The Trial Chamber, citing the International Criminal Court for Rwanda (ICTR) in *Akayesu*²² for the definition of rape, said:

[it] considers the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity. . . . [I]t is difficult to envisage a situation in which rape by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation.²³

14. *Furundzija*, *supra* note 13, ¶ 153.

15. See *International Criminal Tribunal for the former Yugoslavia: Fact Sheet: Furundzija Case* (Dec. 1998) (visited Jan. 11, 1999) <<http://www.un.org/icty/gjance/Furund.htm>> [hereinafter *Furundzija Case*]. *Furundzija*'s indictment charges that while *Furundzija* and another soldier interrogated Witness A and Victim B, he beat them on the feet with a baton, and that *Furundzija* did not intervene while the other soldier raped Victim B. See *id.*

16. *Furundzija*, *supra* note 13, ¶ 256.

17. *Id.* ¶ 257.

18. *Id.*

19. See *Furundzija Case*, *supra* note 15.

20. See *International Criminal Tribunal for the former Yugoslavia: Press Release—Celebisi Case: The Judgment of the Trial Chamber* (Nov. 16, 1998) (visited Jan. 11, 1999) <<http://www.un.org/icty/pressreal/p364-e.htm>>.

21. *Celebisi*, *supra* note 13, ¶ 454.

22. See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (Sept. 2, 1998) (visited Mar. 25, 1999) <<http://www.ictcr.org/english/judgments/okayeso.html>> [hereinafter *Akayesu*]. The Chamber in *Akayesu* found that "rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts." *Id.* § 6.4, ¶ 119; see also *infra* note 38.

23. *Celebisi*, *supra* note 13, ¶ 495.

In *Furundzija*, the Trial Chamber agreed with the *Celebisi* decision and expanded upon the definition of rape formulated by the ICTR in the *Akayesu* case.²⁴ *Furundzija* was the first time that the ICTY had considered war crimes charges stemming exclusively from rape.²⁵ Prosecutors based the case almost entirely on the testimony of the rape victim, following the principle of the ICTY rules that no corroborating witness to rape shall be required.²⁶

2. *Celebisi*—Command Responsibility

The *Celebisi* case²⁷ is also the first elucidation of the concept of command responsibility by an international body since World War II. The Trial Chamber held that a superior may possess the requisite *mens rea* for criminal liability when the superior had actual knowledge, through direct or circumstantial evidence, that subordinates were committing or about to commit crimes or when the superior had information sufficient to put him on notice of the risk of such offenses and indicating the need for additional investigation.²⁸ A superior may be held liable even for failing to take measures that are outside the superior's formal competence if the superior has a "material possibility" of preventing the offenses.²⁹ The Trial Chamber found that command responsibility extends to "not only military commanders, but also to individuals in non-military positions of superior authority."³⁰ Individuals "may incur criminal responsibility under the doctrine of command responsibility on the basis of their *de facto* as well as *de jure* positions as superiors."³¹

II. Rwanda

In 1998, the four-year-old International Criminal Tribunal for Rwanda (Tribunal) made tangible progress toward overcoming its often rocky beginnings.³² In September 1998, the Tribunal secured the first-ever genocide conviction by an international court in the case of Jean-Paul Akayesu, who acquiesced in—and in some cases ordered—violence against thousands of Tutsi. Of particular significance in the *Akayesu* case were the Trial Chamber's expansive definition of rape and its conclusion that rape may constitute genocide.

A. STATUS OF PROCEEDINGS

As of late 1998, the Tribunal had indicted thirty-six individuals, twenty-seven of whom were in custody.³³ The Tribunal continued to receive international cooperation in apprehending

24. See *Furundzija*, *supra* note 13, ¶ 185; see also *infra* note 38.

25. See *Bosnian Croat Found Guilty of Rape; Other Developments*, FACTS ON FILE, Inc., Dec. 17, 1998, at 924 A1.

26. See *International Criminal Tribunal for the former Yugoslavia: Rules of Procedure and Evidence, Rule 96(i)* (visited Dec. 22, 1998) <<http://www.un.org/icty/basic/rpe/rev13e.htm>>. Rule 96(i) "accords to the testimony of a victim of sexual assault the same presumption of reliability as the testimony of victims of other crimes, something long been denied to victims of sexual assault by the common law." *Celebisi*, *supra* note 13, ¶ 956 (quoting *Akayesu*, ¶ 134).

27. See *International Criminal Tribunal for the former Yugoslavia: Judgment of Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo* (Nov. 16, 1998) (visited Jan. 4, 1999) <<http://www.un.org/icty/pressreal/statecel.htm>>.

28. See *Celebisi*, *supra* note 13, ¶ 383.

29. See *id.* ¶ 395.

30. *Id.* ¶ 363.

31. *Id.* ¶ 354.

32. See Stringer, *supra* note 1, at 621; see Leigh & Shenk, *supra* note 1, at 512.

33. See *War Criminal Watch, Rwanda Suspects* (visited Jan. 7, 1999) <<http://www.wcw.org/icty/suspects.html>>.

suspects—as of September 1998, eleven countries had helped to apprehend suspects.³⁴ Two trials were completed in 1998,³⁵ with two more scheduled to begin in early 1999.³⁶

B. LEGAL DEVELOPMENTS

In September 1998, Jean-Paul Akayesu became the first individual ever convicted of genocide by an international court. As a small town mayor in 1994, Akayesu attempted to prevent violence against Tutsi in his area for less than two weeks, after which he was not only present when violence occurred, but also ordered some of the killings.³⁷ Akayesu was convicted of nine counts of genocide and crimes against humanity, but the most significant aspects of his case are the Trial Chamber's definition of rape and its conclusion that rape and other forms of sexual violence may constitute genocide. The Chamber adopted an expansive definition of rape, which it defined as

a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. . . . Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. . . . The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion. . . .³⁸

Because Akayesu had tolerated, and in some cases ordered, acts of sexual violence on government property, the Chamber found that he was criminally responsible for those acts.³⁹

Equally significant in the *Akayesu* case was the Chamber's conclusion that genocide may include rape. It explained that

rape and sexual violence . . . constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. . . . [T]he Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public . . . and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.⁴⁰

Ironically, and although the rapes had been widely reported in the media, Akayesu's initial indictment had not included the rape charges due to a lack of evidence. The rape charges were

34. See *International Criminal Tribunal for Rwanda, First-Ever Judgement on Crime of Genocide Due 2 September* (U.N. press release) (visited Dec. 18, 1998) <<http://www.ictt.org/english/pressrel/backgrnd.html>>. G1

35. See *International Criminal Tribunal for Rwanda, Joint Trial of Clement Kayishema and Obed Ruzindana Comes To A Close* (Nov. 18, 1998 press release) (visited Dec. 18, 1998) <<http://www.ictt.org/english/pressrel/152.html>>. The joint trial of Clement Kayishema and Obed Ruzindana finished in November 1998; a decision is expected in early 1999. See *id.*

36. See *International Criminal Tribunal for Rwanda, Initial Appearance of Omar Serushago, A Former Militia Leader Set for 14 December 1998* (Dec. 8, 1998 press release) (visited Dec. 18, 1998) <<http://www.ictt.org/english/pressrel/154.html>>.

37. See Akayesu, *supra* note 22, § 5.2, ¶ 367.

38. *Id.* § 7.7, ¶ 131.

39. See *id.* § 7.7, ¶¶ 139-50.

40. *Id.* § 7.8, ¶ 215.

added only after a witness mentioned the rapes at trial, prompting questions from the Tribunal's lone female judge and, eventually, further investigation.⁴¹

In addition to the conviction in the *Akayesu* case, the Tribunal secured guilty pleas from two defendants whose pleas took on significance beyond their individual admissions of responsibility. In September 1998, Jean Kambanda, the prime minister following the 1994 plane crash that killed Rwandan President Juvenal Habyarimana, pleaded guilty to six counts that included genocide and crimes against humanity. With his plea, Kambanda admitted "that there was in Rwanda in 1994 a widespread and systematic attack against the civilian population of Tutsi, the purpose of which was to exterminate them,"⁴² and that the government not only followed the massacres without attempting to stop them, but also effectively assumed responsibility for the actions of the *Interabamwe* (the paramilitary group that played a key role in the Rwandan genocides).⁴³ Kambanda provided extensive testimony to prosecutors, who hope to use it against other government and military leaders.⁴⁴ Despite his guilty plea and cooperation, the Trial Chamber sentenced Kambanda to life in prison, citing the atrocity of the crimes, Kambanda's position of authority, and his lack of contrition.⁴⁵ In November 1998, Omar Serushago, an *Interabamwe* leader, pleaded guilty to four counts of genocide and crimes against humanity.⁴⁶ His plea was the first admission of responsibility by a paramilitary leader.⁴⁷

Despite the Tribunal's progress in 1998, room for improvement remains. Complaints about the operation of the Tribunal still persist,⁴⁸ to the extent that one judge threatened to resign in protest.⁴⁹ The U.N. Security Council's authorization of a third Trial Chamber, along with three additional judges,⁵⁰ may bring defendants to trial more quickly—a development that is viewed as particularly important in light of parallel proceedings in Rwandan courts, where over 125,000 people are awaiting trial and 116 people have already been sentenced to death in trials that human rights advocates claim do not meet minimum international standards of justice.⁵¹

41. See *When Rape Becomes Genocide*, N.Y. TIMES, Sept. 5, 1998, at A10.

42. *Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgement and Sentence*, ¶ 39 (Sept. 4, 1998) (visited Mar. 25, 1999) <<http://www.ictf.org/english/judgments/kambanda.html>> [hereinafter *Kambanda*].

43. See *id.*

44. See James C. McKinley, Jr., *Ex-Rwandan Premier Gets Life in Prison on Charges of Genocide in '94 Massacres*, N.Y. TIMES, Sept. 5, 1998, at A4.

45. See *Kambanda*, *supra* note 42, ¶¶ 42-44, 51.

46. See *International Criminal Tribunal for Rwanda, Former Militia Leader, Omar Serushago Pleads "Guilty" to Genocide and Other Crimes But "Not Guilty" to Rape* (Dec. 14, 1998 press release) (visited Dec. 18, 1998) <<http://www.ictf.org/english/pressrel/155.html>>. Prosecutors subsequently withdrew a rape charge against Serushago. See *id.*

47. See *id.*

48. See Barbara Crossette, *U.N. Chief Pays a Visit To Tribunal For Rwanda*, N.Y. TIMES, May 6, 1998, at A13.

49. See James C. McKinley, Jr., *U.N. Tribunal, in First Subj Trial Verdict, Convicts Rwandan Ex-Mayor of Genocide*, N.Y. TIMES, Sept. 3, 1998, at A14.

50. See S.C. Res. 1165, U.N. SCOR, 53d Sess., U.N. Doc. S/PV.3877 (1998).

51. See McKinley, *supra* note 49, at A14.