The Law of Genocide in the Jurisprudence of ICTY and ICTR in 2004

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The year 2004 has brought a range of judgments by the ad hoc tribunals with regard to genocide. It is remarkable that two of the most interesting verdicts come from the ICTY – a body which has only once found an accused guilty as a perpetrator of genocide (and that ruling was partially overturned in April 2004). Three characteristics of the crime featured particularly strongly in the discussions of the tribunals. There is firstly, in view of the intent to destroy the “part” of a protected group, the requirement of substantiality, there is secondly the question of a co-existence of differing reasons for the commission of the crime; and there is thirdly the development of the interpretation of “serious bodily or mental harm”, which was advanced in particular by the ICTY in Brdjanin. The paper will trace the jurisdiction in view of the crime of genocide; it will, for this purpose, focus on the judgments of Trial and Appeals Chambers of the ICTY and the ICTR.

1. The Prosecutor v Jean de Dieu Kamuhanda, ICTR
Trial Chamber, 22nd January 2004

Twenty-two days into the new year, the Trial Chamber of the ICTR found Kamuhanda guilty of genocide. Before the Tribunal, Kamuhanda stood accused of having led attacks by soldiers and militias against Tutsis in a church in Gikomero. In view of the legal assessment, the case did not bring many new developments. The Trial Chamber did confirm the findings in

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2 The Appeals Chamber Judgment in Krstic, IT-98-33-A; and the Trial Chamber Judgment in Brdjanin, IT-99-36-T.
3 Other developments, such as Rule 98 bis decisions, are outside the remit of the current consideration.
4 The Prosecutor v Jean de Dieu Kamuhanda [Kamuhanda], Case No. ICTR-95-54A-T.
Akayesu and Kayishema and Ruzindana on the determination of serious bodily and mental harm\textsuperscript{6}, and added that “serious mental harm need not be permanent or irremediable”\textsuperscript{7}. The question of substantiality was also broached; the Trial Chamber found that the intent to destroy a protected group “in whole or in part” required an intent to destroy “more than an imperceptible number of the targeted group”\textsuperscript{8}. This understanding of the rule – which the textual analysis of the ICTR Statute did not necessitate – was destined to play a major part in the considerations of other Trial Chambers later in the year.

2. The Prosecutor v André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe, ICTR Trial Chamber, 25\textsuperscript{th} February 2004

On 25\textsuperscript{th} February 2004, Trial Chamber III of the ICTR rendered its judgment on Ntagerura, Bagambiki and Imanishimwe. All three accused were charged with the crime of genocide\textsuperscript{9}. While Bagambiki and Ntagerura were acquitted of all charges and set free, Imanishimwe was found guilty of genocide and sentenced to 27 years imprisonment\textsuperscript{10}.

The Trial Chamber drew the inference of genocidal intent from four different sources. In view of a massacre whose victims were mainly Tutsi refugees at the Gashirabwoba football field, the Chamber considered the manner in which the soldiers killed their targets\textsuperscript{11}, the extent of the massacre\textsuperscript{12} as well as other attacks occurring in the Cyangugu prefecture at the same time\textsuperscript{13}. But it did also consider the process of selection that had preceded the killings; the soldiers had asked the refugees whether they were all Tutsis and were consequently able to conclude that the “primary ethnic composition” of the people at the football field was Tutsi\textsuperscript{14}. It is interesting to note that the judges did not give extensive consideration to the fact the victims had replied that some Hutus were among them\textsuperscript{15}. It is recalled that the

\textsuperscript{6} Kamuhanda, para. 634
\textsuperscript{7} Kamuhanda, para. 634
\textsuperscript{8} Kamuhanda, para. 628
\textsuperscript{9} The Prosecutor v André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe, [Ntagerura, Bagambiki, Imanishimwe] Case No. ICTR-99-46-T, para. 661
\textsuperscript{10} Ntagerura, Bagambiki, Imanishimwe, para. 827
\textsuperscript{11} Ntagerura, Bagambiki, Imanishimwe, para. 690
\textsuperscript{12} “In the Chamber’s view, the manner in which the soldiers killed the refugees and the resulting large number of victims reflect the soldiers’ intention to destroy members of the Tutsi ethnic group, in whole or in part.”, Ntagerura, Bagambiki, Imanishimwe, para. 690
\textsuperscript{13} Ntagerura, Bagambiki, Imanishimwe, para. 690
\textsuperscript{14} Ntagerura, Bagambiki, Imanishimwe, para. 690
\textsuperscript{15} Ntagerura, Bagambiki, Imanishimwe, para. 690