

UPDATES FROM THE INTERNATIONAL AND INTERNATIONALIZED CRIMINAL TRIBUNALS

INTERNATIONAL CRIMINAL COURT

PROSECUTOR UNABLE TO PROCEED WITH PRELIMINARY EXAMINATION IN PALESTINE

On April 3, 2012, the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) announced that it was unable to continue its preliminary examination in the Occupied Palestinian Territories because it did not have authority to determine whether Palestine qualified as a “state.” The Rome Statute, the founding treaty of the ICC, requires such a classification before the Court may exercise jurisdiction. Instead, the OTP decided that only relevant UN bodies or the ICC Assembly of States Parties (ASP) had competence to make that determination. The Prosecutor’s decision raises a new legal question that the Rome Statute does not appear to answer: who has authority to determine whether Palestine qualifies as a state for the purposes of the Court’s jurisdiction?

The question of Palestinian statehood in the ICC context arose after January 22, 2009, when Palestine lodged a declaration accepting ICC jurisdiction under Article 12(3) of the Rome Statute. Specifically, Palestine sought an ICC investigation into alleged war crimes and crimes against humanity committed during Operation “Cast Lead,” the 2008-2009 Israeli offensive in the Gaza Strip. ICC jurisdiction requires that either a “State” (under Article 12) or the UN Security Council (under Article 13(b)) confer jurisdiction. Given that the UN Security Council has not referred the situation in Palestine to the ICC and Palestine has not become a State Party to the Rome Statute, the only way to obtain ICC jurisdiction is through an Article 12(3) *ad hoc* declaration. Article 12(3) provides for acceptance of ICC jurisdiction by a “State which is not Party to this Statute,” and the present debate revolves around whether Palestine qualifies as such a state.

In response to the OTP’s decision, some legal scholars and civil society organizations have argued that the OTP should have referred the question to ICC judges

for a judicial determination rather than to the UN or ASP for a political decision. Advocates of the judicial approach point to Article 19(3) of the Rome Statute, which provides that “the Prosecutor may seek a ruling from the Court regarding a question of jurisdiction.” ICC jurisdiction could arguably be considered a question of fact that must be submitted to the judges for an impartial judicial decision.

Supporters of the judicial approach also fear that a political determination will indefinitely deny victims an opportunity for justice while political bodies attempt to resolve the complex issue of Palestinian statehood. Referring the decision to political bodies could be viewed as a delay tactic intended to avoid making a politically unpopular decision. There are also concerns that leaving this decision to political bodies will undermine the judicial independence of the Court. The Court’s limited jurisdiction already projects an impression of bias because all of its investigations are currently in Africa, and any political influence over the decision to open an investigation could exacerbate this problem.

On the other hand, some civil society organizations supported the OTP’s decision to refer the question to the UN or the ASP. Supporters of the political approach argue that UN bodies must recognize Palestine as a state before it qualifies as a state capable of accepting the jurisdiction of the ICC. By contrast, Israeli Foreign Ministry spokesman Yigal Palmor questioned the role of *any* international bodies, whether political or judicial, stating: “[i]f the [Palestinian Authority] has any grievance, the proper way to deal with it is to talk to Israel and try to sort this out directly. Resorting to the ICC or to the UN or to any far away institution . . . that’s just a waste of time.”

The OTP’s decision comes more than three years after Palestine accepted ICC jurisdiction. This delay has denied victims their day in court and made preservation and collection of evidence more difficult. As the ICC continues to develop and face new legal questions, it is important for the Court to resolve these issues in a way that maintains the independence of the Court

and respects its goal to provide a forum where victims have access to justice in a timely manner.

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THE ICC DELIVERS HISTORIC DECISION ON REPARATIONS FOR VICTIMS IN THE CASE OF CONVICTED CONGOLESE WARLORD THOMAS LUBANGA

In yet another historic first for the International Criminal Court (ICC) as it enters the second decade of its existence, the Court—specifically, Trial Chamber I—has decided upon a set of guiding principles to be applied to reparations for victims of Thomas Lubanga Dyilo. The Chamber issued its decision in August 2012 in the context in of the situation in the Democratic Republic of Congo (DRC), in the case of Mr. Lubanga, former President of the *Union des Patriotes Congolais* and Commander-in-Chief of its military wing, *Force patriotique pour la liberation du Congo* (FPLC). Mr. Lubanga was convicted in March 2012 of committing, as co-perpetrator, war crimes consisting of enlisting and conscripting children under the age of fifteen years and using them to participate actively in armed conflict not of an international character in the DRC—a crime punishable under Article 8 of the Rome Statute (RS), the Court’s founding document. In July 2012, Mr. Lubanga was sentenced to a total period of fourteen years of imprisonment.

In rendering its decision, the three-judge panel of the Chamber sought to establish reparations applicable to the Lubanga case *specifically*, which—depending on the scope and extent of damage, loss, and injury—may include restitution, compensation, and/or rehabilitation, as well as other reparations of a symbolic, preventative, or transformative value. According to the panel, the very need for reparations reflects a growing consensus among the Court’s architects, advocates, and stakeholders that “there is a need to go beyond the notion of punitive

justice, towards a solution which is more inclusive, encourages participation, and recognises [sic] the need to provide effective remedies for victims,” which, as the panel recognized, is a “well-established and basic human right.” Though there is indeed a punitive element to reparations, which require those responsible to repair the harm they caused, they are ultimately intended to relieve suffering, afford a more tangible measure of justice, and contribute to the rebirth of affected communities. As a unique and key feature of proceedings, the success and viability of the reparations system is, from the perspective of the panel, fundamental to the success and viability of the Court itself.

Within this framework, the three-judge panel set forth the following principles intended to guide a proportional, adequate, and prompt reparations system in the Lubanga case—a system designed to promote reconciliation, reflect local cultural or customary values (unless discriminatory), and be self-sustaining. According to the panel, the pool of those eligible includes both direct and indirect victims, which in turn includes (1) family members with a close personal relationship to direct victims, (2) any individual who attempted to prevent or intervene in the commission of the crimes for which Mr. Lubanga was convicted, and (3) those who suffered personal harm as a result of the crimes. Reparations may also be granted to individuals, collectives of individuals, or to legal entities, which *inter alia* includes non-governmental organizations (NGOs), charitable and non-profit organizations, schools, hospitals, cooperatives, or microfinance institutions.

The panel also set forth a general policy against discrimination or stigmatization based on whether the victim participated in proceedings, or based on such characteristics as gender, age, race, colour [sic], language, religion or belief, political or other opinion, sexual orientation, national, ethnic or social origin, wealth, birth, or other status. However, this does not limit the Court from assigning priority to victims who are particularly vulnerable or are in need of urgent assistance or medical care, such as children dealing with severe trauma, the elderly, those with disabilities, and the victims of sexual or gender violence. With regard to victims of sexual- or gender-based violence, the Court shall tailor its reparations awards to reflect acknowledgement that “the consequences of these crimes

are complicated... operate on a number of levels... can extend over a long period of time... [and] require a specialist, integrated and multidisciplinary approach.” When considering children, the Court shall use as guidance the Convention on the Rights of the Child, which enshrines the fundamental principle of the “best interests of the child.” Reparations shall take into account the age of the child and, in the case of child soldiers, should emphasize rehabilitation and reintegration, and seek to maximize the child’s personality, talents, and abilities.

According to the panel, all damage, loss, or injury that forms the basis of a reparations claim must have flowed from the specific crimes for which Mr. Lubanga was convicted. There is no mention in either the Rome Statute or ICC Rules of Procedure and Evidence of the standard the Court must adopt in assessing the causal chain of a reparations claim, nor is there any settled standard in international law. In this specific case, however, the panel found that the Court may adopt the “direct” or “immediate effects” standards, as well as the less rigid “proximate cause” standard. That is, the Court may grant a reparations claim provided (1) there exists a “but/for” relationship between the crime and the harm and (2) the crimes for which Mr. Lubanga was convicted were the proximate cause of the harm for which reparations were sought. The standard for evaluating claims of proximate cause is, according to the panel, “a less exacting standard” than proof beyond a reasonable doubt, and instead approaches the standard of “balance of probabilities” without at all compromising the fair trial rights of the convicted individual.

While the panel made clear that these principles and procedures were “limited to the circumstances of the present case” and was “not intended to affect” future cases, its decision will nonetheless lay a foundation for what could eventually become an extensive line of jurisprudence coming out of the Court. The reparations system produced by this particular decision will undoubtedly provide guidance and inform decisions on victims reparations moving forward. In the present case, the panel declared Mr. Lubanga indigent, which triggers the use of the Trust Fund for Victims (TFV)—considered the first of its kind in the international justice landscape—which manages resources derived from voluntary contributions from states and individuals to fulfill the Court-imposed

reparations system when the convicted individual is declared indigent. The Fund currently maintains a reserve for reparations totaling roughly \$1.5 million USD. 85 victims have put forth claims in the case of Mr. Lubanga, while “many more” may be eligible. The Fund’s leadership hailed the decision, and welcomes the role it will play. Some external stakeholders, however, are more cautiously optimistic, and will monitor the process closely to ensure the Court successfully delivers on the promises to victims contained in the decision.

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AD HOC TRIBUNALS

EQUAL TREATMENT FOR GENOCIDAIRE: SENTENCE ENFORCEMENT AT THE ICTY AND ICTR

As the years since the atrocities of the 1990s in Rwanda and the former Yugoslavia increase, many of those convicted by the international tribunals serving sentences throughout Europe and Africa have applied for and been granted early release. Government officials and the victims of the conflicts have expressed concern and dismay over these early releases, often questioning the rationale of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) for even considering early release. Yet the tribunals are tasked with ensuring fair and equal treatment of convicted persons, and have consistently upheld the right of convicted persons to seek early release, if specific criteria are satisfied. This right is not consistently available, however, and this inconsistency has the potential to result in unequal sentence enforcement.

As with the defense principles of due process and equality of arms prior to conviction, equality in sentence enforcement after conviction must operate free from a desire for retribution and deterrence based solely on the nature of the crime, taking into account the rights of the convicted and his or her ability to rehabilitate. This approach is not always popular, as made clear in the recent statements of Rwanda’s Prosecutor General, Martin Ngoga, who advocated that the ICTR reexamine the concept of allowing early release for convicted *genocidaires*. In opposing the three early releases granted

by the ICTR thus far, Mr. Ngoga questioned the relevance of good conduct in prison after one has committed the crime of genocide. If early releases are to be allowed, he advocates a precursory genuine apology to survivors and the community. Croatia's president Ivo Josipovic also questioned the appropriateness of early release from the ICTY, advocating a base standard of serving full sentences with rare exception.

As provided in the ICTR and ICTY Statutes, when a person convicted by a tribunal requests early release, that tribunal's President decides on the appropriateness of the release based on recommendations from the state where the sentence is being served, after consultation with the Prosecutor and sentencing Chambers. The Rules of Procedure and Evidence of the ICTR and the ICTY provide factors that, *inter alia*, the President must take into account in this decision, including the gravity of the person's crime(s), the treatment of similarly situated prisoners, the person's demonstrated rehabilitation, and any cooperation with the Prosecutor on other cases. The tribunals also mandate that the convicted party complete two-thirds of his or her sentence before it will consider a petition for early release.

Another important prerequisite to any petition for early release is that the state enforcing the person's sentence must approve a request for early release under its own law. This requirement is laid out in tribunal statutes and in each state's sentence enforcement agreement (see Albania's, for example), and is based on the statutory requirement that the enforcing state's laws govern the sentences of those convicted by a tribunal. The wide variability of these domestic laws presents a significant challenge to equal enforcement of sentences. As observed by Klaus Hoffman, former Legal Officer at the ICTY, two men convicted of the same crime and sentenced to life imprisonment may have drastically different experiences depending on the country where they serve their sentences. One man may secure early release in 15 years, while the other may stay in prison for his entire life.

The potential for unequal sentence enforcement is a negative side effect of state-enforced tribunal sentences, and hints at the benefits of a sentence enforcement standardization effort on the part of the international community. As with so many of the concerns raised in these early years of international criminal jurisprudence, equality

of enforcement is a weighty issue for the future credibility of the ICTY and the ICTR, and for the International Criminal Court when the tribunals complete their mandates. Effective standardization would ideally find a delicate three-way balance between promoting effective punishment while equally enforcing sentences, respecting the frustrations of victims at the early release of a perpetrator, and upholding the sovereignty of the state enforcing the sentence.

ADC-ICTY RELEASES FIRST DEFENSE-FOCUSED LEGACY DOCUMENT

In a notable milestone for the legacy of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Association for Defense Council Practicing before the ICTY (ADC-ICTY) announced the release of its "Manual on International Criminal Defense" in late 2011, officially launching it in February 2012. The Manual is the product of the EU-funded War Crimes Justice Project, a joint effort by the ADC-ICTY and UN Interregional Crime and Justice Research Institute, coordinated by the Organization for Security and Co-operation in Europe. Following a path laid clear by the Tribunal's "ICTY Manual on Developed Practices (2009)," the Manual on International Criminal Defense (Manual) is the first legacy document of its kind to function as a treatise on international criminal defense proceedings before the ICTY.

The Manual is specifically tailored to the unique challenges of defense activities before the ICTY and is intended to be of practical use for domestic war crimes courts in the region of the Former Yugoslavia. It is also designed to be a resource for international criminal defense jurisprudence writ large. The Manual's diverse pool of authors are defense lawyers who have practiced before the ICTY and national courts in the region of the Former Yugoslavia, representing the collective defense experience of the ADC-ICTY over its decade of existence, as well as the experience of previous defense counsel since the founding of the ICTY.

The Manual presents prose-based explanations and case-specific interpretations of the ICTY's Rules of Procedure and Evidence (RPEs), information that would take months to compile for even an experienced defense lawyer beginning practice at the ICTY. The explanations are tailored to reflect the ICTY's blend of civil and common law traditions, providing lawyers

with extensive practice experience in either tradition with an expedited primer in an often unfamiliar system of procedure. This civil law-common law blend has presented difficult hurdles since the ICTY's first case, *Prosecutor v. Erdemović*, where both the Accused's counsel and the Trial Chamber came from civil law systems in which a guilty plea is typically an evidentiary consideration for the court, rather than a mitigating factor in sentencing. The Accused's counsel and the judges had to learn the common law concept of a plea agreement to practice before the Tribunal, as required by Rule 62 ter of the RPEs. The Manual effectively reduces the barriers to entry in a legal practice area typically hampered by a lack of experienced legal professionals.

Structurally, the Manual outlines every stage of a defense proceeding before the Tribunal, from initial indictment through post-conviction appeals in domestic legal systems carrying out ICTY sentences. Each chapter provides practical tips from ICTY cases to explain the applicable RPEs and novel legal concepts, such as Joint Criminal Enterprise, that have emerged more recently. Furthermore, the Manual makes occasional distinctions between ICTY practices and those adopted by the Rome Statute of the International Criminal Court.

Recognizing the broad stakes of international criminal trials, the Manual begins with an extensive look at reasonable doubt, the prosecution's standard of proof for ultimate guilt and underlying facts, highlighting the ICTY's strict interpretation of the presumption of innocence. Following an explanation of affirmative defenses, the Manual provides a guide to developing a case theory and strategy, complete with a chapter on the logistics of defense investigations that details methods for adequately taking advantage of the defense's reliance on the Office of the Prosecutor when building a defense, while also conducting independent investigations. The Manual then provides a basic approach to structuring a legal argument, before extensively covering the ICTY's permissive standards for accepting evidence, and noting the criticism this approach often faces. The use of witnesses is covered next, followed by an explanation of the witness examination process. The Manual then explains the plea agreement concept and the associated sentencing process, finishing with the appeals process, and various post-conviction issues.

The ICTY's contribution to the budding field of international criminal defense is enduring and highly regarded, as evidenced in frequent citation by the other *ad hoc* and hybrid courts and the International Criminal Court. The ICTY was the first international criminal justice court, and the experience it imparts in the Manual will serve to memorialize its accomplishments, while promoting the right to a fair trial that is pivotal to the legitimacy of the international criminal courts that have formed in its wake.

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INTERNATIONALIZED TRIBUNALS

INVESTIGATIONS, MISCONDUCT, AND UNCERTAINTY IN THE ECCC REGARDING CASE 003

Case 003 in the Extraordinary Chambers in the Courts of Cambodia (ECCC) has been surrounded by controversy since it began in year 2009. The case has further aggravated tensions between the international community and the Cambodian government. Recent disputes over the closing and subsequent re-opening of the investigation in Case 003 and the appointment of International Co-Investigating Judge Laurent Kasper-Ansermet highlight the challenges facing the ECCC. These tensions underscore the ongoing divide between the tribunal's international and national judges and the difficulties the ECCC will likely continue to face.

The co-investigating judges are tasked with investigating cases brought by the co-prosecutors and issuing charges. Co-investigating Judges Blunk and You closed the brief investigation in Case 003 on April 29, 2011, without issuing indictments, despite international pressure to continue the investigation. The judges did not indicate why they closed the investigation, so the Office of the Prosecutor appealed the decision, arguing that the judges should have performed further investigations into the alleged crimes. Subsequently, civil parties and international NGOs accused two of the investigating judges of misconduct. Judge Blunk, one of the international co-investigators, resigned in late 2011, and Judge Kasper-Ansermet was appointed in his place as reserve international judge. Both

civil parties and international NGOs allege that the judges post-dated documents and failed to properly investigate suspects who had close ties to the current Cambodian Government.

Under Article 3 of the Agreement between the UN and the Cambodian government establishing the ECCC, each chamber is composed of an equal number of national judges and international judges. The judges are nominated by the UN and confirmed by the Cambodian Supreme Council of the Magistracy. Any order or verdict issued by the ECCC requires a majority vote, including at least one national judge. This system was designed as a compromise with the Cambodian government in an attempt to ensure the ECCC's independence from the national judiciary system. Most recently, the Supreme Council of the Magistracy withheld the required confirmation, thereby blocking the nomination of Judge Kasper-Ansermet, despite the fact that the UN approved his nomination and authorized his re-opening of the investigation in Case 003. Because of the continual refusal of the Cambodian government to cooperate with Judge Kasper-Ansermet's appointment and investigation into Cases 003 and 004, Judge Kasper-Ansermet resigned from his appointment, effective May 4, 2012.

Although the names of suspected individuals are confidential, some information regarding the suspects in Case 003 has leaked, indicating the seriousness of the crimes for which the accused could be charged. After the Co-Prosecutors prematurely released the names of the suspects in Case 003, it became evident that many suspects still hold political positions in the Cambodian Government, which is perhaps why the Prime Minister of Cambodia does not want the case to continue. However, it is unclear why Judge Blunk sided with national Judge You to close the investigation in April 2011. Cambodian and international NGOs strenuously protested the closure, and urged the UN to investigate both judges and to re-open the case. Judge Kasper-Ansermet re-opened the investigation into Case 003 in December 2011 over objections from national co-investigating Judge You and the Cambodian Government, who viewed the investigation as a ploy by the international community to influence national politics.

Citing the failure of Judge Blunk to properly investigate, Judge Kasper-Ansermet found "good cause" to re-open the investigation. The Open Society Justice Initiative

(OSJI), a monitoring and reporting NGO, argued that both Judge Blunk and national Judge You deliberately misled the Court to "create the illusion of a genuine investigation." OSJI alleged that the judges added documents to the case file and back-dated other documents. However, the Cambodian government asserts that the Court should finish with Case 002 and dismiss Cases 003 and 004. Because national judges still hold political seats in the national judicial system, OSJI is concerned that the ability of the court to continue the re-opened investigation will be compromised by national political pressure and the resignation of Judge Kasper-Ansermet.

The disagreement between the two co-investigating judges and the ability of the Cambodian government to force the resignation of international Judge Kasper-Ansermet calls into question the credibility and independence of the ECCC. As a result, the investigation may not be seen as complete or in the interest of the victims. Although the ECCC opened in 2003, only five individuals have been accused, and only one has been sentenced. As an international tribunal, the ECCC faces tensions between the impartiality requirements of international justice and the pull of national politics. If the Cambodian government continues to block the appointment of international judges willing to investigate Cases 003 and 004, future investigations might not occur and Case 003 may be further delayed. The genocide perpetrated by the Khmer Rouge regime occurred over thirty years ago. The longer the victims wait for justice, the less poignant it will be, especially as the perpetrators age and their ability to stand trial decreases.

Furthermore, the ECCC was designed as a hybrid tribunal to ensure judicial independence and to provide a model of reform to the ailing Cambodian justice system. Achieving international justice objectives such as ensuring fair trials and eliminating impunity for crimes against humanity and genocide are hindered if the ECCC cannot remain impartial to national political concerns. If the pre-trial chamber and trial chamber can break away from the international and national divide, investigations into Case 003 may remain open, despite Judge Kasper-Ansermet's resignation. But as tensions remain high, the outcome in this case and the overall legacy of the ECCC continues to be uncertain.

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

**THE PROSECUTOR V. GRÉGOIRE
NDAHIMANA, CASE NO.
ICTR-01-68-T**

Gregoire Ndahimana was brought to trial at the International Criminal Tribunal for Rwanda (ICTR) on three counts related to crimes against Tutsis. The Prosecution charged him with genocide or, in the alternative, complicity in genocide, and extermination as a crime against humanity. Ndahimana was a member of the *Mouvement Démocratique Républicain* (MDR), a political party in Rwanda, as well as the *bourgmestre* of Kivumu commune. The charges against him concern events that took place in Kivumu commune between April 6 and April 16, 1994. In particular, the charges related to attacks on the Nyange Parish, where hundreds of Tutsis had taken refuge, that occurred on the April 15-16, culminating in the physical destruction of the church while the refugees were sheltering inside of it and resulting in the death of approximately 2,000 Tutsi men, women and children. While a majority of the Trial Chamber found that the Prosecution failed to find beyond a reasonable doubt that the accused committed, planned, instigated, or ordered the attacks against Tutsis at the Nyange Parish, it found that he bore superior responsibility for the members of the communal police who carried out the attack on April 15, and then he aided and abetted the attack that took place on April 16. Based on its findings that the attacks of April 15 and 16 amounted to genocide and extermination as a crime against humanity, and that Ndahimana acted with the requisite *mens rea*, the majority convicted him of the first and third counts brought by the Prosecution. Because complicity in genocide was charged only in the alternative, the Chamber dismissed this charge. Ndahimana was sentenced to fifteen years in prison with credit for time already served. Judge Florence Rita Arrey issued a dissenting opinion in which she contended that Ndahimana should have been convicted for committing genocide and extermination as a crime against humanity based on his participation in a joint criminal enterprise

(JCE) aimed at exterminating Tutsis in Kivumu commune.

Much of the evidence put forth by the Prosecution was intended to establish that Ndahimana took place in a series of meetings between April 11 and April 16 at which a JCE was formed with the purpose of transporting a large number of Tutsis to Nyange Parish for the purpose of exterminating them. However, while the majority of the Trial Chamber determined that, although the evidence established that the accused participated in several of the relevant meetings, and that a JCE did exist among certain of the other persons who attended the same meetings, the Prosecution failed to establish that Ndahimana “shared the intent to destroy the Tutsi population in whole or in part.” While conceding that, in “most cases, genocidal intent will be proven by circumstantial evidence,” the majority stressed that, “in such cases, the finding that the accused possessed the requisite *mens rea* must be the only reasonable inference from the totality of the evidence.” Here, the majority could not reach such a conclusion and thus determined that the accused was not a member of the joint criminal enterprise described by the Prosecution. As stated above, Judge Arrey issued a dissenting opinion on this point, finding that circumstantial evidence did in fact establish that Ndahimana possessed genocidal intent. Among other factors, Judge Arrey pointed to the fact that the accused “met regularly with the members of the criminal enterprise throughout the relevant period, before, during, and immediately after the killings,” suggesting he “accepted the plan, and that his participation in the enterprise was valuable, and possibly essential;” that he failed to assign the communal police officers under his control to protect the refugees at the parish, despite threats against them; and that, following the destruction of the church on April 16, Ndahimana and other members of the JCE “celebrated the successful implementation of the criminal plan” over drinks. Based on this and other evidence, Judge Arrey concluded that “by an unknown time on 14 April 1994 Ndahimana shared the intent of his co-perpetrators to destroy in part or in whole the Tutsi community of Kivumu commune.”

Despite the majority’s finding that Ndahimana lacked genocidal intent, it nevertheless determined that he bore responsibility for crimes committed on April 15 and 16. With respect to the attack on the parish on April 15, the Trial Chamber first found Ndahimana’s alibi evidence to be “reasonably possibly true,” and thus held the Prosecution failed to establish beyond a reasonable doubt that he was physically present at the parish during that day’s attack. However, the Trial Chamber found that the accused bore superior responsibility for members of the communal police that directly perpetrated the attacks on April 15. To establish superior responsibility under Article 6(3) of the ICTR Statute, the Court must find: (1) a superior-subordinate relationship existed, meaning that the “superior must have had effective control over the subordinates at the time the offence was committed;” (2) the superior knew or had reason to know that the criminal acts were about to be or had been committed by his subordinates; and (3) the superior failed to take necessary and reasonable measures to prevent such criminal acts or to punish the perpetrators. According to the Trial Chamber, Ndahimana exercised effective control over the communal police through his role as *bourgmestre* of the commune, as he had the authority to assign the police to specific tasks and to promote and demote police members. Furthermore, the Chamber held that circumstantial evidence established that the accused had reason to know that the police had committed attacks against Tutsis at the parish on April 15 resulting in the death of hundreds of Tutsi refugees, as Ndahimana arrived at the scene several hours after the attack and the “situation at the parish [at that time] must have been so chaotic that any person coming there would have known that a large scale attack had occurred that day.” In addition, the Chamber noted that Ndahimana subsequently met with at least three of the persons directly involved in the attack. Finally, the Chamber determined that, although Ndahimana had the authority to punish the perpetrators of the attack, he took no action to do so. The Chamber then went on to determine that the April 15 attack amounted to genocide, as the physical perpetrators of the

attack acted with the intent to destroy the Tutsi population in whole or in part. The Chamber also determined that the attack amounted to extermination as a crime against humanity, as those carrying out the attack intended to carry out killing of Tutsis on a massive scale and knew that their actions formed part of a widespread attack against the civilian Tutsi population on ethnic grounds. Thus, the Chamber concluded that Ndahimana bore superior responsibility for genocide and extermination as a crime against humanity in relation to the events of April 15.

Turning to the physical destruction of the church on April 16, the Chamber first determined that the communal police over whom Ndahimana exercised effective control did not participate in this attack, and thus the accused could not be held liable for the attack based on a theory of superior responsibility. Furthermore, while the Chamber determined that Ndahimana was physically present for both the planning and the execution of the April 16 attack, as stated above, the majority of the Chamber determined that Ndahimana did not possess the specific intent to commit genocide and thus could not be held responsible for genocide based on his role committing, planning, ordering, or instigating the destruction of the church. Nevertheless, the majority did determine that those responsible for carrying out the attack did act with genocidal intent, and that Ndahimana was aware of the genocidal intent of those carrying out the attack. Furthermore, the Chamber determined that Ndahimana's physical presence during the attack amounted to tacit approval or encouragement of the attack, particularly when combined with the fact that he did not take any action to punish those involved in the previous day's attack. Thus, the Chamber determined, Ndahimana was responsible for aiding and abetting genocide based on the destruction of the church on April 16. The Chamber also determined that Ndahimana aided and abetted extermination as a crime against humanity on April 16, as he must have known that the physical perpetrators intended to carry out killing on a massive scale and that their actions formed part of a widespread attack against the Tutsi civilian population on ethnic grounds. Interestingly,

although the crime against humanity of extermination does *not* require that the accused intended to destroy a protected group in whole or in part, the Chamber did not consider whether Ndahimana bore responsibility under an alternate mode of liability, such as participation in a JCE or planning, even though it had dismissed those modes of liability in relation to the genocide charges based on a finding that the accused lacked the requisite genocidal intent. Notably, the Prosecution charged Ndahimana with all forms of liability available under Article 6(1) of the ICTR Statute, as well as under Article 6(3).

Turning to sentencing, the majority of the Chamber determined that fifteen years was an appropriate sentence taking into the account the gravity of the crime and aggravating and mitigating circumstances. In particular, while noting that the charges of which the accused was convicted were extremely grave, it also took into account "the nature of the accused's participation." By contrast, because she found that the accused "was not a mere accomplice in the genocide at Nyange parish, but a principal perpetrator of that crime," Judge Arrey concluded that she would have "sentenced him to a longer term of imprisonment than did the [m]ajority," but did not specify the amount of years she found appropriate.

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**DOMINIQUE NTAWUKULILYAYO
V. THE PROSECUTOR, CASE NO.
ICTR-05-82-A**

On December 14, 2011 the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) issued its judgment in the case against Dominique Ntawukulilyayo, who served as sub-prefect of the Gisagara sub-prefecture in Rwanda from 1990 through 1994. In August 2010, the Trial Chamber found Ntawukulilyayo guilty of genocide pursuant to Article 6(1) of the Statute of the Tribunal for his role in the mass killings of Tutsis at Kabuye Hill on April

23, 1994. Although Ntawukulilyayo was originally charged with genocide, complicity in genocide, and direct and public incitement to commit genocide, the Trial Chamber only convicted the accused of genocide. Specifically, the Chamber found that, by instructing Tutsi refugees to move from Gisagara Market to Kabuye Hill and by transporting soldiers to the hill who subsequently killed hundreds of these refugees, Ntawukulilyayo was guilty of ordering and aiding and abetting the killings. For his participation in these events, the Trial Chamber sentenced Ntawukulilyayo to twenty-five years' imprisonment. Because the Prosecution had charged complicity in genocide as an alternative charge to genocide, the Trial Chamber dismissed that count upon determining that the accused was guilty of genocide; the direct and public incitement to genocide charge was dismissed based on a lack of evidence supporting the charge. On appeal, Ntawukulilyayo raised six challenges to his conviction and sentence. In part, he alleged that the Trial Chamber erred in finding that he instructed Tutsi refugees to move to Kabuye Hill and that he transported soldiers to the hill who later committed the attack. Ntawukulilyayo also alleged that he had not been given sufficient notice as to the charge of *ordering* genocide as a specific mode of liability. Ntawukulilyayo asked the Appeals Chamber to acquit him on all counts or significantly reduce his sentence. In its judgment, the Appeals Chamber affirmed the conviction for aiding and abetting genocide but reversed the conviction for ordering genocide and consequently reduced Ntawukulilyayo's sentence to twenty years' imprisonment.

Ntawukulilyayo did not succeed in contesting the Trial Chamber's finding that he arrived in Gisagara on the afternoon of April 23, 1994, gathered Tutsi refugees in the market, and ordered them to move to Kabuye Hill. Ntawukulilyayo challenged the testimony of Prosecution witnesses, claiming that they neither corroborated one another nor were credible in their own right, and also challenged the finding that the testimony of the seven Defense witnesses who claimed not to have seen him in the market was of limited probative value. The Appeals Chamber found that although

the accounts of the Prosecution witnesses did contain a minor discrepancy as to whether or not Ntawukulilyayo used a megaphone to address the refugees in the market, they contained a significant number of similarities. Thus, the Appeals Chamber determined that the Trial Chamber did not err in finding the testimony “consistent and convincing” and also agreed that the discrepancies could reasonably be explained by varying vantage points and the passage in time. Furthermore, the Appeals Chamber recalled that the Trial Chamber has the discretion to decide “whether corroboration is necessary and to rely on uncorroborated, but otherwise credible, witness testimony.” Similarly, although Ntawukulilyayo attacked the credibility of two Prosecution witnesses for inconsistencies between their testimony in this trial and the earlier *Kalimanzira* trial, the Appeals Chamber found that the Appellant failed to demonstrate that the Trial Chamber improperly assessed the variances. Ntawukulilyayo argued that the testimonies contained fundamental discrepancies as to the date and time that he allegedly arrived at the market and the number and category of security personnel that were with him and therefore should not have been considered credible. However, the Appeals Chamber agreed with the Trial Chamber that any inconsistencies could reasonably be explained by the passage of time and other “varying circumstances” and recalled that “the purpose of appellate proceedings is not for the Appeals Chamber to reconsider the evidence and arguments submitted before the Trial Chamber.” It also was not persuaded by Ntawukulilyayo’s argument that the Trial Chamber erred in finding that the testimony of Defense witnesses who never saw Ntawukulilyayo at the market did not cast sufficient doubt on the Prosecution’s case. It determined that none of the Defense witnesses were in a position to observe the market during the entire time in question and found “no error in the Trial Chamber’s preference for positive eyewitness testimony.”

Ntawukulilyayo was also unsuccessful in arguing that the Trial Chamber erred in finding that he arrived at Kabuye Hill in the late afternoon or early evening of April 23, 1994 with Callixte Kalimanzira and an unknown number

of soldiers, stopped briefly at the hill to drop off the soldiers, and left shortly thereafter. Ntawukulilyayo again argued that Prosecution witnesses did not provide credible testimony and that the Trial Chamber failed to properly assess the exculpatory evidence submitted by the Defense. The Appeals Chamber found that the Trial Chamber did in fact address the variances in witness testimony as to the time of day that Ntawukulilyayo arrived at the hill, the type of vehicle he arrived in, the number and category of security personnel with him, and the presence of Kalimanzira. Therefore, it considered the issue on appeal to be “whether [the testimonies] differ to such extent as to render the testimonies of the witnesses incompatible with one another.” As to time of day, although the Appeals Chamber found that the Trial Chamber should have more explicitly addressed the discrepancies, it noted that the Trial Chamber’s conclusion that Ntawukulilyayo arrived “[i]n the late afternoon *or* evening of Saturday 23 April 1994” reflects that it was aware of the inconsistencies and was satisfied with the explanation that these differences could be explained by the passage of time and the traumatic nature of the events. As to the type of vehicle Ntawukulilyayo arrived in, the number and category of security personnel with him, and the presence of Kalimanzira, the Appeals Chamber considered Ntawukulilyayo’s claim that the Trial Chamber ignored material inconsistencies in testimony to be similarly unfounded. It found that “varying vantage points, the passage of time and the traumatic nature of the events” were indeed reasonable explanations for these minor differences in testimony.

Although the Appeals Chamber found that Ntawukulilyayo did not successfully demonstrate that the Trial Chamber erred in any of its factual findings, it did find that Ntawukulilyayo was not given sufficient notice as to the charge of ordering genocide. It considered that the lack of notice effectively meant that Ntawukulilyayo was not given adequate opportunity to raise a defense to the charge at trial and that the Trial Chamber therefore erred in holding him responsible for ordering the killings on Kabuye Hill. Paragraph 5 of the Indictment stated

that “the accused . . . is individually responsible for the crimes of genocide or complicity in genocide because he instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of these crimes” and concluded with a statement that “[t]he particulars that give rise to [Ntawukulilyayo’s] individual criminal responsibility are set forth in paragraphs 6 through 22.” While these later paragraphs outline the particular acts that are the basis for the charges of committing, instigating, and aiding and abetting the killings on Kabuye Hill, they do not plead material facts that specifically describe how Ntawukulilyayo ordered the killings. At trial, the Prosecution argued that the general mention in Paragraph 5 of ordering as a mode of liability was sufficient to put Ntawukulilyayo on notice that he was charged with ordering the events described in subsequent paragraphs, including the killings on Kabuye Hill. On review, the Appeals Chamber began by recalling that “the charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused.” It did not agree that the general language of the Indictment in the preamble clearly indicated that ordering as a mode of liability was intended to apply to all of the specific events outlined in later paragraphs. Even considering the Indictment as a whole, the Appeals Chamber also did not find that the material facts pleaded in the rest of the Indictment reasonably lead to the conclusion that Ntawukulilyayo was charged with ordering the killing. It found that none of the references to Ntawukulilyayo giving orders “involve [him] ordering anyone to kill members of the Tutsi group at Kabuye Kill, or otherwise ordering an act or omission with the awareness of the substantial likelihood that Tutsis would be killed at Kabuye Hill in the execution of that order by the persons who received it.” Since “[a] Trial Chamber can only convict the accused of crimes that are charged in the Indictment,” the Appeals Chamber granted Ntawukulilyayo’s appeal on this ground and reversed the Trial Chamber’s conviction for ordering genocide.

In light of the fact that its decision to reverse the conviction for ordering

genocide removed the only direct — as opposed to accessory — form of responsibility for which Ntawukulilyayo had been found guilty, the Appeals Chamber reduced his sentence to twenty years' imprisonment. The Appeals Chamber also confirmed that the sentence will be

further reduced by the period of time that Ntawukulilyayo has already spent in detention since his arrest in October 2007.

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CHARLES TAYLOR CONVICTED ON ALL CHARGES

On April 26, 2012, the Trial Chamber of the Special Court for Sierra Leone (SCSL) delivered a judgment against Charles Taylor. The SCSL is the first internationalized court to convict a head of state since the Nuremberg trials following World War II. The indictment was issued on March 7, 2003 and the case commenced on June 4, 2007. Charles Taylor was convicted of eleven charges, including crimes against humanity, violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, and other serious violations of international humanitarian law committed between November 30, 1996 and January 18, 2002, when the Court had jurisdiction. Although the trial phase is over, many issues remain, including subsequent appeals and compensation for the victims.

Charles Taylor led the National Patriotic Front of Liberia (NPLF) from 1989 to 1997 and was the president of Liberia from 1997 to 2003. In addition to participating in and leading the civil war in Sierra Leone, Taylor also participated in the civil war in Liberia, where he backed and helped lead the Revolutionary United Front (RUF). The civil wars in Liberia and Sierra Leone were closely related in terms of political ideology, guerilla tactics and players. Additionally, both conflicts were bloody and gruesome, leading to the death of an estimated 50,000 people in Sierra Leone and leaving thousands of others mutilated by rebel tactics that included cutting off limbs as punishment. Both countries are still fragile and many still fear Taylor's ability to control events in West Africa. After his indictment and subsequent arrest, Liberia and Sierra Leone requested his transfer to the Hague.

The Defense acknowledged that during the indictment period under the jurisdiction of the court, November 30, 1996 to January 18, 2002, crimes against humanity

and war crimes were committed, but claimed that Taylor had no responsibility. The Prosecution had to prove, "(i) that the crimes were actually committed; (ii) that the crimes fulfill all the legal elements of Articles 2, 3 and 4 of the Statute; and (iii) that there is a nexus between the alleged crimes and the Accused." The prosecution presented evidence of forced rape, amputations, the trafficking of illegally mined diamonds known as blood diamonds, arms deals, and embezzlement. Throughout the trial, 115 witnesses testified about the atrocities committed during the civil war under Taylor's supervision and direction, the alleged diamond trading, and Taylor's financial embezzlement during his reign as president. The witnesses included victims, former child soldiers and U.S. nationals. Taylor testified on his own behalf over the course of seven months.

The Trial Chamber found Charles Taylor guilty of all eleven counts in the indictment. The eleven charges included: acts of terrorism, murder, violence to life, harm to the health and physical or mental well-being of persons, rape, sexual slavery, outrages upon personal dignity, violence to life, other inhumane acts, conscripting or enlisting children under the age of 15 years into armed forces, enslavement, and pillage. The Trial Chamber also examined evidence of events that occurred prior to the Indictment period to establish "by inference the elements of criminal conduct that occurred during the material period, or demonstrating a consistent pattern of conduct." In light of the evidence prior to and during the indictment period, the Trial Chamber found that Taylor provided support and arms and ammunition to the RUF and that he directed military personnel. Sufficient evidence also linked Taylor to the blood diamond trade with the RUF. In conclusion, the Trial Chamber found that Taylor "was aware of the crimes committed by RUF/AFRC forces against civilians...as early as August 1997."

Article 6(3) of the Statute states that a superior is responsible for the actions of subordinates "if the superior knew or had reason to know that his or her subordinate was about to commit crimes prohibited by the Statute or had done so, and the superior failed to take the necessary and reasonable measures to prevent or punish the perpetrators." The Trial Chamber found that although Taylor had "substantial influence" over the RUF, he did not have "effective command," so he was not criminally responsible for crimes under Articles 2, 3 and 4 committed by subordinates. Additionally, the Trial Court found that the prosecution failed to prove beyond a reasonable doubt that Taylor "participated in a common plan" to commit crimes alleged in the Indictment, so he was not found guilty of Joint Criminal Enterprise. However, the Trial Chamber found that prosecution did prove beyond a reasonable doubt that under Article 6(1), Taylor is guilty of aiding and abetting and planning the commission of the crimes in the Indictment.

As the Charles Taylor case draws to a close, issues concerning reparations for victims as well as the role of the Court in the reconciliation process of Sierra Leone are now at the forefront. The SCSL has already sentenced eight other leaders, but the success of the Court in terms of bringing relief for the victims is questioned. Because Taylor's fortune amassed during the civil war has not yet been discovered, it is difficult to envision financial reparations for the victims. However, while the Court may not be able to bring compensation to the victims, this case has set the important precedent that a head of state may be convicted by an international tribunal and brought to justice.

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