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Criminal Courts and Tribunals

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CRIMINAL COURTS AND TRIBUNALS

INTERNATIONAL CRIMINAL COURT

ICC TO DETERMINE JURISDICTION OVER LIBYAN OFFICIALS AND SET PRECEDENT ON COURT'S SCOPE

Libya has challenged the admissibility of the International Criminal Court's (ICC) case against Saif al-Islam Qaddafi and Abdullah al-Senussi on charges of crimes against humanity on the grounds that the State is capable of conducting a fair trial according to its domestic law and is in the process of building a case against both men. The May 2012 motion submitted on behalf of the government of Libya requested an oral hearing on the admissibility challenge pursuant to Article 19 of the Rome Statute by arguing that the case against the former officials in the government of Muammar Qaddafi should be deemed inadmissible because domestic investigations and prosecutions are underway in Libya. The expected ruling by the Pre-Trial Chamber on admissibility in this case could set important precedents on both admissibility and the scope of ICC jurisdiction. If the Court allows Libya to carry out the trials of both defendants domestically, the result would strengthen the ability of States to challenge admissibility and make it more difficult for the ICC to bring international criminals to justice.

Under Article 5 of the Rome Statute, the ICC has jurisdiction over serious crimes that concern the international community as a whole, including genocide, crimes against humanity, and war crimes. Prosecutors charged both Saif al-Islam Qaddafi and al-Senussi with two counts of crimes against humanity in connection with the murder and persecution of Libyan civilians during the 2011 popular uprising. However, the Court may only exercise this jurisdiction in accordance with the principle of complementarity. The principle, as stated in the Preamble and in Article 1 of the Rome Statute, declares that ICC jurisdiction exists alongside national criminal jurisdictions and must defer to ongoing national prosecutions and investigations. Article 19 allows a State to challenge admissibility if that State is actively investigating and prosecuting the

defendant for the crimes alleged by the Prosecutor of the ICC.

Libya's challenge invoked both its right to dispute the admissibility of the case under Article 19(2)(b) and the principle of complementarity under Article 1. Libya has held Qaddafi in custody since November 2011, and Mauritania recently extradited al-Senussi to Libya after capturing him in March 2012. Libyan officials have stated repeatedly that the two men will be tried in Libya under Libyan law with the possibility of facing the death penalty if convicted.

In response to Libya's challenge, the ICC Office of the Prosecution noted that under Article 17 of the Rome Statute, admissibility-challenge determinations are made using a two-step process. First, national investigation and prosecution must be ongoing. Second, those proceedings must be "genuine." The challenging State must demonstrate that the proceedings are "genuine" within the meaning of Article 17(1)(a) by showing that the proceedings are not merely a pretense designed to shield the accused or guarantee impunity, and under Article 19 that the State is able to advance the proceedings in accordance with Article 17(3). Under Article 17(3) the Court will examine whether there has been a substantial collapse of the judicial system and if the State is unable to conduct investigations and trials. The prosecution ultimately agreed that Libya has taken genuine steps toward investigating the charges against Qaddafi and al-Senussi but also expressed concern about Libya's ability to advance the case in domestic courts. The prosecution thus requested more information from Libya about its ability to advance the case domestically. The Pre-Trial Chamber responded in October 2012 and requested public hearings in order to make a final decision on Libya's ability to advance domestic prosecution.

The concepts of admissibility and complementarity in international criminal law remain debated among human rights scholars and advocates. Many argue that the ICC should be regarded as only a court of last resort; Libya should be allowed to

conduct a domestic prosecution. Others claim Libya's justice system is not currently capable of carrying out a free and fair trial, so a domestic trial would result in further human rights violations and a delay in justice for the civilian victims of the Libyan uprising. The ICC's questionable jurisdiction over Qaddafi and al-Senussi highlights one of the biggest challenges the ICC has faced in its few years of existence: the difficult task of balancing state sovereignty with accountability for human rights abuses. If Libya submits both men to the ICC, it would be a symbolic milestone for the Court's authority and would bolster or perhaps legitimize that authority in the eyes of the international community.

FIRST PERSON CONVICTED BY ICC APPEALS CONVICTION AND SENTENCE

In an historic moment for the International Criminal Court (ICC), Thomas Lubanga became the first person convicted by the Court. Lubanga was found guilty of enlisting and conscripting child soldiers in an armed conflict on the side of the Union of Congolese Patriots (UPC) in the Democratic Republic of Congo and sentenced to fourteen years' imprisonment. While both the defense and the prosecution are appealing the sentence, the ICC's verdict and sentencing in Lubanga's case is a landmark that monumentally bolsters the accountability of the court. However, a fight over the conviction and the sentencing procedure could have serious consequences for not only the other Congolese nationals currently still on trial at the ICC but also for all future cases brought against alleged perpetrators of war crimes.

Following Lubanga's March 14, 2012, conviction, at the request of the defense and pursuant to the Rome Statute Article 76(2), the Trial Chamber held a separate sentencing hearing. On July 10, 2012, at the conclusion of the hearing, the ICC Trial Chamber I sentenced Lubanga. The time from Lubanga's arrest on March 16, 2006, until the date of his sentencing was deducted from his sentence, resulting in less than eight years' further imprisonment for his crimes. Lawyers on both sides of the judgment are not satisfied with the

Chamber's decision. On October 3, 2012, Lubanga's lawyers filed both a notice to appeal the guilty verdict and a notice of intent to have his sentence canceled or reduced. On the same day, the prosecution likewise informed the Chamber of its intent to appeal the sentence seeking a harsher punishment.

In the Chamber's sentencing decision analysis, it looked to the applicable articles of the Rome Statute as well as the Rules of Procedure and Evidence for guidance. Specifically, Article 76(1) of the Statute states that the Trial Chamber shall decide the appropriate sentence, taking into account "the evidence presented and [the] submissions made during the trial that are relevant to the sentence." Article 77(1) allows for sentencing up to a maximum of thirty years except in cases when a term of life imprisonment is "justified by the extreme gravity of the crime and the individual circumstances of the convicted person." Most importantly, Article 78 together with Rule 145 gives guidelines for determining sentences. Article 78(1) says the sentence must take into account "the gravity of the crime and the individual circumstances of the convicted person." Rule 145(1)(a) and (b) state that the sentence must reflect the culpability of the convicted person and the Chamber needs to balance all of the relevant factors, including aggravating factors and mitigating circumstances.

In applying these guidelines, the Trial Chamber identified six relevant factors that it took into account in determining Lubanga's sentence: the gravity of the crime and resulting damage, the large-scale and widespread nature of the crimes, the degree of participation and intent of the convicted person, the individual circumstances of the convicted person, aggravating circumstances, and mitigating circumstances. The Trial Chamber found that while the involvement of children was widespread, the Chamber could not conclude beyond a reasonable doubt that a precise number or proportion of the recruits were under the age of fifteen. The Trial Chamber found that as President and Commander-in-Chief of the UPC, Lubanga encouraged children to enlist and even personally employed bodyguards under the age of fifteen. Additionally, the Trial Chamber determined that Lubanga, an intelligent and well-educated person, understood the seriousness of the crimes

committed. The Trial Chamber considered several claims of aggravating circumstances presented by the prosecution, including punishment of the children while under Lubanga's control, alleged sexual violence against the child soldiers, and commission of the crime when the victims were particularly defenseless, but each was dismissed. Finally, although the Trial Chamber accepted Lubanga's cooperation with the Court as a mitigating factor, the Chamber dismissed the defense's argument that Lubanga's actions during the conflict were necessary to achieve demobilization and peace.

Article 81 of the Rome Statute stipulates the grounds for appeal of a conviction or sentence. Lubanga may appeal his conviction on the grounds of procedural error, error of fact, error of law, or on a ground of unfairness or unreliability of the proceedings or decision. According to Article 81(2), however, either side may appeal a sentence if it is disproportionate to the crime. A reversal of Lubanga's landmark conviction or a reduction of his sentence would likely raise human rights concerns about the ICC's ability to achieve accountability for victims and to eliminate impunity. However, an increase in his sentence may also raise concerns of overly harsh punishments, especially in setting precedent for future sentencing, including those for convictions for genocide and crimes against humanity.

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INTERNATIONALIZED CRIMINAL TRIBUNALS

KARADZIC'S RIGHT TO A FAIR TRIAL: PROTECTING THE ACCUSED IN THE ICTY

The International Criminal Tribunal for the former Yugoslavia (ICTY) Trial Chamber rejected Radovan Karadzic's motion for retrial on August 13, 2012. The former Serbian leader, accused of involvement in the Srebrenica massacre, based his motion on the prosecution's repeated failure to submit evidence in a timely fashion. The ICTY held that while the prosecution submitted evidence in violation of the rules of procedure, the delay did not prejudice the defense's case or deny the defendant his right to fair trial.

The wartime leader of the Serb-controlled area of Bosnia, known as Republika Srpska, has been on trial since 2009 for charges of genocide, persecution, extermination, murder, and forced relocation of Bosnian Muslims and Croats, crimes committed between 1992 and 1996. Karadzic, who is representing himself, pled not guilty to all charges against him. The Chamber maintains that, although the prosecution has repeatedly failed to produce evidence on time, the judges ensured that the defense had ample time to review evidence and prepare responses.

The case's central allegation is that Karadzic was involved in planning both the 1995 Srebrenica massacre—resulting in the death of 8,000 Muslim men and boys—and the forty four-month siege of Sarajevo—resulting in 12,000 deaths. After the United Nations Security Council instituted the ICTY, Karadzic remained at large for thirteen years before his July 2008 arrest.

Karadzic's motion for a retrial accused the prosecution of failing to disclose 406 witness statements and other testimonies in a timely fashion in addition to committing "numerous" violations of the rules of disclosure. Since the trial began in 2009, Karadzic has filed more than seventy motions alleging various late or improper disclosures of evidence. In several of such instances, the ICTY Trial Chamber stopped trial proceedings and provided Karadzic with sufficient time to review documents or other late evidence. Despite the prosecutors' repeated infractions of the ICTY's rules of procedure, the Trial Chamber's Judge Kwon, in the August decision, ruled that while the actions "put the prosecution in a bad light," Karadzic had not "suffered damage from this violation," and thus it was not necessary to grant him a new trial.

As the ICTY has not established a standard to determine fairness of a trial, the Chamber looked to general protections of the rights of the accused as outlined in the Statute of the Tribunal. Articles 20(1), 21(4)(c) and 21(4)(b) protect the accused's right to be tried expeditiously, without undue delay, with full respect of his or her rights (as enumerated in other international treaties, such as the International Covenant on Civil and Political Rights), and to have "adequate time and facilities for the preparation of his defense." The Chamber also considered its own procedural rulings in each of Karadzic's previous complaints

about the Prosecutor's failure to disclose. The Chamber explained its decision by applying the general articles delineated in the Statute and looking at the cumulative effect of the repeated delays of disclosure. Judge Kwon's decision stated that the nature of the evidence was neither sufficiently different from other evidence nor substantial enough to prejudice Karadzic's case.

In reaching its decision, the Chamber's central question was how the defendant's procedural rights relate to whether the defendant has received a fair trial. The ICTY has often faced such questions and has applied Judge Shahabuddeen's statement in his Separate Opinion on Slobodan Milošević that "the fairness of a trial need not require perfection in every detail. The essential question is whether the accused has had a fair chance of dealing with the allegations against him." In light of the prosecution's repeated missteps, the question of whether Karadzic receives a sufficiently "fair chance" of addressing the charges against him broadens because of his refusal to accept the advice of legal counsel. Although the Chamber has undertaken "active management" of the trial to protect Karadzic's rights when the prosecution has violated the rules of disclosure, the court is unable to force Karadzic to listen to or take the advice of his court-appointed standby legal adviser. As the trial moves forward, the Chamber must continue to balance the often-competing interests in protecting the rights of the accused, helping Karadzic navigate his defense without legal representation, and ensuring that the prosecution does not infringe on Karadzic's right to a fair trial.

INTERNATIONAL CRIMINAL TRIBUNAL FOR CYBERCRIME AND HUMAN RIGHTS

As communication and commerce shift into the cyberworld, some states have questioned criminal law's ability to protect commercial and public interests. In his "Recommendations for Potential New Global Legal Mechanisms Against Global Cyberattacks and Other Global Cybercrimes," Norwegian Judge Stein Schjølberg, Chairman of the global High-Level Experts Group on Cybersecurity, called for increased enforcement mechanisms, writing that "without an international court or tribunal for dealing with the most serious cybercrimes of global concern, many serious cyberattacks will go unpunished." Schjølberg argued that

the 2001 Council of Europe Convention on Cybercrime (Cybercrime Convention), although open internationally for ratification, is insufficient to address all global cybercrimes. The crimes of concern to Schjølberg in his draft Statute for the International Criminal Tribunal for Cyberspace (ICTC) include attacks on communication infrastructure, illegal access, forgery, identity theft, and fraud—all of which reflect the Cybercrime Convention's structure and delineated crimes. For Schjølberg, however, the Cybercrime Convention falls short because it lacks an authoritative body capable of enforcing the laws in the realm of international criminal law. For non-European countries, the Cybercrime Convention does not address Internet-based crimes that are common among developing and transitional nations.

In the absence of an international tribunal, states have addressed cybercrime through domestic legislation. Recently, the Philippines's legislature passed a law reflecting acts criminalized in the Cybercrime Convention; however, the legislation included an additional crime that, according to that nation's Supreme Court, violates citizens' human rights. The Filipino law expanded the definition of criminal libel to include statements made on the Internet and increased the penalty for criminal libel to six years' imprisonment. In 2011, the United Nations' Human Rights Committee declared that imprisonment of Filipino journalists for libel violated Article 19 of the International Covenant on Civil and Political Rights (ICCPR). In keeping with this ruling, the Filipino Supreme Court determined that the new law violates the human rights to freedom of expression and opinion.

Like the Cybercrime Convention, Judge Schjølberg's recommendation garnered criticism for being too Euro-centric and ignoring the unique threats and concerns that developing nations face. Although the Cybercrime Convention is open for ratification globally, the treaty is only widely accepted within Europe, and the only non-Member State parties are the United States and Japan. When Brazil considered signing the Convention, it eventually decided not to because the intellectual property-crime provisions were not compatible with Brazil's developing and emerging market. Such emerging markets, which also include China, Russia, India, and Turkey,

are often the most vulnerable and at the highest risk for cyberthreats.

The draft ICTC statute claims to outline the most serious crimes that would trigger the tribunal's jurisdiction over individuals, but it does not include any Internet crimes that implicate human rights, and it leaves conspicuously absent any mention of freedom of speech. Judge Schjølberg recommended including the ICTC as a specialized bench within the International Criminal Court (ICC), a body established to address, as stated in the Rome Statute establishing the Court, the "most serious crimes of concern to the international community," including genocide, crimes against humanity, and war crimes. It is unclear how the defined cybercrimes meet the ICC's jurisdiction, which generally covers the gravest breaches of human rights. The proposed tribunal also does not address the prominent cybercrime discussion occurring among international bodies, states, and non-governmental organizations, a discussion that focuses on limitations to speech online, the vulnerability of individuals' human rights to freedom of expression, and speech included within cybercrime legislation. Furthermore, creating an international court tasked with prosecuting individuals accused of committing cybercrimes, particularly without addressing the human rights implications of such crimes and the legislation countries pass to prevent them, increases vulnerability of individuals to domestic criminal laws that include additional provisions that restrict human rights.

A 2012 Freedom House study on Internet freedoms and human rights found that twenty of the forty seven studied countries experienced a loss in Internet freedom since January 2011. In June 2012, the UN Human Rights Council passed a resolution affirming Internet freedom as a human right. By proposing a tribunal that addresses only economic or privacy-based crimes on the Internet, Schjølberg ignores one of the most prominent concerns regarding Internet safety and opens the door to repressive state governments to adopt laws in compliance with the proposed tribunal that may easily include clauses and provisions that overstep citizens' rights to Internet access, freedom of expression, and access to information.

Critics argue that the only way to establish a global governing document or body

to regulate cybercrime is to allow input and ownership of nations from throughout the world. It may be wasteful to throw away the successes of the Cybercrime Convention and Judge Schjølberg's Recommendations,

but redrafting and amending the treaty to include representatives from developing and developed nations alike would add legitimacy to the process.

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

**THÉONESTE BAGOSORA AND ANATOLE
NSENGIYUMVA V. THE PROSECUTOR,
CASE NO. ICTR-98-41-A**

On December 14, 2011, the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) issued its judgment in the case against Théoneste Bagosora and Anatole Nsengiyumva, two of the four defendants tried in the *Bagosora et. al.* case, affirming some but not all charges. Both before and during the 1994 conflict, the men held high-ranking positions in the Rwandan Government: Nsengiyumva served as the Commander of the Gisenyi Operational Sector and Bagosora served as Directeur de Cabinet for the Ministry of Defense. Both the Trial Chamber and the Appeals Chamber found that Bagosora held effective control over the Rwandan Armed Forces from April 6–9, 1994, because the President was killed and the Minister of Defense was out of the country. The Prosecution alleged that both Nsengiyumva and Bagosora were responsible for genocide, crimes against humanity, and war crimes, either through directly ordering the attacks, or pursuant to the doctrine of superior responsibility.

In its judgment of December 18, 2008, Trial Chamber I found Bagosora guilty of genocide, six counts of crimes against humanity (comprising extermination, rape, persecution, two counts of murder, and other inhumane acts), and three counts of war crimes (two counts of violence to life and one count of outrages upon personal dignity). Specifically, the Trial Chamber held Bagosora responsible for ordering the murder of Augustin Maharangari, as well as for ordering killings, rapes, and other crimes committed from April 6-9, 1994, at Kigali roadblocks. Furthermore, the Trial Chamber found Bagosora guilty of superior liability for additional crimes, including the killings of the Prime Minister, the killings

of civilians, rapes at a Kigali roadblock, the sexual assault of the Prime Minister, the torture of Alphonse Kabiligi, and the sheparding of refugees to Gikondo Parish, where the refugees were killed.

The Trial Chamber found co-defendant Nsengiyumva guilty of genocide, four counts of crimes against humanity (murder, extermination, persecution and inhumane acts), and one war crime (violence to life). Specifically, the Trial Chamber found Nsengiyumva guilty of ordering and guilty as a superior for the killings of individuals, as well as ordering the murder of Alphonse Kabiligi. The Trial Chamber also found Nsengiyumva aided and abetted the killings in the Bisesero area of Kibuye prefecture by sending militiamen to participate.

On appeal, Bagosora raised six challenges to his conviction and sentence. Bagosora alleged errors with regard to the Trial Chamber's finding that he exercised effective control over subordinates, fair trial violations with regard to the enforcement of a subpoena, errors in the assessment of the evidence, errors of law regarding the theory of superior responsibility, and specific errors regarding his conviction for the sexual assault of Prime Minister Uwilingiyimana and his role in crimes committed at roadblocks in Kigali, as well as errors related to cumulative convictions and sentencing. Co-defendant Nsengiyumva raised fifteen challenges to his conviction and sentence. He alleged that the Trial Judgment was void due to the resignation of Judge Reddy before the release of the written judgment and raised several grounds relating to the fairness of the proceedings, including the right to an initial appearance without delay, the right to be tried without undue delay, the right to be present at trial, the fact that the Trial Judgment did not admit some of the evidence he submitted, and errors relating to disclosure. He also alleged errors regarding insufficiencies in the indictment and the burden of proof upon the prosecution; insufficiency of the proof against him;

errors with regard to the assessment of the evidence, including the credibility of several witnesses; inaccurate characterization of the mode of responsibility; errors regarding how the Trial Chamber defined the elements of genocide, crimes against humanity, and war crimes, and errors relating to cumulative convictions and sentencing.

The Appeals Chamber affirmed Bagosora's convictions for genocide, extermination and persecution as crimes against humanity, and violence to life as a war crime in relation to killings at Kibagabaga Mosque, Kabeza, the Saint Josephite Centre, Karama Hill, Kibagabaga Catholic Church, Gikondo Parish, and Kigali-area roadblocks; extermination and persecution as crimes against humanity; and violence to life as a war crime in relation to the killings of Prime Minister Agathe Uwilingiyimana, Joseph Kavuruganda, Frédéric Nzamurambaho, Landoald Ndasingwa, and Faustin Rucogoza, as well as the killings at Centre Christus; murder as a crime against humanity and violence to life as a war crime in relation to the killings of the Belgian peacekeepers who were still alive when Bagosora visited Camp Kigali; rape as a crime against humanity in relation to the rapes committed at Kigali area roadblocks, the Saint Josephite Centre, and Gikondo Parish; other inhumane acts as crimes against humanity in relation to the stripping of female refugees at the Saint Josephite Centre and the "sheparding" of refugees to Gikondo Parish, where they were killed; outrages upon personal dignity as a war crime in relation to the rapes at Kigali area roadblocks, the Saint Josephite Centre, and Gikondo Parish; and murder as a crime against humanity.

Notably, however, the Appeals Chamber reversed Bagosora's convictions for several charges including, his convictions for crimes against humanity and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (war crimes)

in relation to the killings of Alphonse Kabiligi, Augustin Maharangari, and the Belgian peacekeepers murdered before his visit to Camp Kigali, as well as his convictions for genocide, crimes against humanity, and war crimes in relation to the killings at Nyundo Parish on April 7-9, 1994. The Appeals Chamber also reversed his convictions for genocide, crimes against humanity, and war crimes in relation to the killings in Gisenyi town on April 7, 1994, and at Mudende University on April 8, 1994, and his conviction for other inhumane acts as a crime against humanity in relation to the defilement of the corpse of Prime Minister Agathe Uwilingiyimana. Furthermore, the Appeals Chamber set aside his conviction under individual criminal responsibility for ordering the crimes committed at Kigali road-blocks while affirming his conviction under superior responsibility for those same offenses. Acting *proprio motu*, the Appeals Chamber reversed Bagosora's conviction for murder as a crime against humanity—reasoning it was impermissibly cumulative given his conviction for extermination as a crime against humanity—and set aside his sentence of life in prison, replacing it with a sentence of thirty-five years' imprisonment.

In the case of Nsengiyumva, the Appeals Chamber affirmed his convictions for genocide, extermination and persecution as crimes against humanity, and violence to life as a war crime for the killings in Gisenyi town on April 7, 1994. However, the Chamber reversed his convictions for genocide, crimes against humanity, and war crimes for aiding and abetting the crimes at Bisesero in the second half of June 1994, his convictions for genocide, crimes against humanity, and war crimes in relation to the killings at Mudende University on April 8, 1994, and at Nyundo Parish April 7–9, 1994, as well as his convictions for crimes against humanity and war crimes in relation to the killing of Alphonse Kabiligi. While the Appeals Chamber reversed his convictions for the April 7, 1994, killings in Gisenyi Town under individual criminal liability, finding he did not order these crimes, the Appeals Chamber affirmed his conviction for these killings (charged as genocide, the crimes against humanity of persecution and extermination, and the

war crime of violence to life) under superior responsibility. Nsengiyumva's sentence was shortened from life in prison to fifteen years.

The Appeals Chamber focused much attention on the discussion of whether, despite the fact that the defendants could not be found guilty of ordering the crimes, the defendants could be found guilty pursuant to the superior responsibility mode of liability under Article 6(3) of the ICTR Statute as a result of their positions of authority in the military. The Appeals Chamber held that due to the defendants' positions within the military, they had a duty to prevent or punish soldiers or others under their control from engaging in illegal acts. The Appeals Chamber stated that “the duty to prevent arises for a superior from the moment he knows or has reason to know that his subordinate is about to commit a crime, while the duty to punish arises after the commission of the crime.” Additionally, the duty to prevent requires sufficient knowledge that the crimes will occur.

In analyzing whether Bagosora had sufficient knowledge that the crimes in Kigali would be committed, the Appeals Chamber looked at the “organized military nature of the attacks, his position of authority, the circumstances in which the crimes took place, and the fact that they occurred in Kigali where he was based.” From this information, the Appeals Chamber concluded the Trial Chamber was correct in finding that “the only reasonable inference available from the evidence was that [Bagosora] had actual knowledge that his subordinates were about to commit the crimes” throughout Kigali. This knowledge triggered Bagosora's duty to prevent and/or punish the acts of his subordinates. Furthermore, the Chamber made a geographical distinction between the crimes committed in Kigali and the crimes committed in Gisenyi, finding that Bagosora was not liable as a superior for the crimes in Gisenyi town but was liable as a superior for similar crimes in Kigali.

In its consideration of the specific murders against high-ranking officials, including Prime Minister Agathe Uwilingiyimana, the Appeals Chamber recounted the factors the Trial Chamber had identified in inferring Bagosora's

knowledge of the impending attacks against these victims. These included the timing of the attacks, which started within hours of the killing of President Habyarimana; the systematic nature of the attacks; the prominence of the victims; and the fact that they occurred at the time when Bagosora was at the top of the military chain of command and had effective control over the Rwandan Armed Forces. Thus, the Appeals Chamber concluded that the Trial Chamber did not err in finding that Bagosora had the requisite knowledge that these attacks were about to occur.

Having determined that Bagosora's knowledge of his subordinate's attacks triggered his duty to prevent or punish these crimes, the Appeals Chamber then examined whether Bagosora violated this duty. The Chamber stated that a superior meets the duty when the superior takes necessary and reasonable measures to prevent and punish. Applying this rule to the facts, the Chamber concluded that Bagosora did not meet the duty to prevent reasoning that “(i) Bagosora knew his subordinates were about to commit the crimes, (ii) that the military—over which Bagosora exercised effective control—had the resources to prevent the crimes, and (iii) that to the extent that it lacked resources, it was because they were deployed in executing the crimes.” The Appeals Chamber held that the Trial Judgment did not formulate a reasoned opinion on the issue of whether or not Bagosora fulfilled his duty to punish and instead arrived at the conclusion without analyzing whether a reasonable attempt to punish was undertaken. The Appeals Chamber thus completed its own analysis and concluded that due to the short period of time during which Bagosora exercised effective control over the military, in combination with evidence suggesting that investigations into the crimes may have started during Bagosora's control, a reasonable person could not conclude that Bagosora failed to take measures to punish culpable subordinates. The Appeals Chamber thus concluded that while the Trial Chamber had erred in its analysis of Bagosora's failure to punish, the Trial Chamber had not erred in finding him guilty under the doctrine of superior responsibility as he had indeed failed to prevent his subordinates' crimes (including genocide and rape) at Kigali

roadblocks. Nonetheless, the Appeals Chamber did not cite the error as a factor in the sentence reduction.

With respect to Nsengiyumva, the Appeals Chamber found that while he did not order attacks in Gisenyi town, as the Trial Chamber had ruled, he possessed sufficient knowledge of the attacks that his subordinates carried out in Gisenyi town (because he was stationed there) to be held accountable under the doctrine of superior responsibility.

The Appeals Chamber also addressed Bagosora's arguments regarding his conviction for the sexual assault of the Prime Minister. Bagosora was convicted of the crime against humanity of "other inhuman acts" due to the fact that a bottle was inserted into the Prime Minister's vagina after her death. Bagosora argued that sexual assault can be perpetrated only against a living person because the prohibition on sexual assault is meant to protect the sexual integrity of a person and there is no sexual integrity after death.

The Appeals Chamber did not answer the legal question posed in Bagosora's argument regarding the applicability of sexual assault charges to atrocities committed after the victim's death. Rather, the Appeals Chamber analyzed the language of the indictment and the Trial Judgment and considered whether or not Bagosora was convicted of conduct for which he was not charged, an argument the defendant had not advanced, according to the Appeals Judgment. The Chamber stated that while the insertion of a bottle into the vagina of the Prime Minister after her death "constituted a profound assault on human dignity meriting unreserved condemnation under international law," because the indictment of Bagosora read, "Prime Minister Agathe Uwilingiyimana was tracked down, arrested, sexually assaulted and killed by Rwandan Army personnel," the indictment appeared to describe the events as if the Prime Minister had been sexually assaulted prior to her death. Thus, in the view of the Appeals Chamber, the indictment failed to give proper notice to Bagosora that he was charged with acts occurring after her death. Dissenting, Judge Pocar criticized the Chamber's interpretation of Bagosora's appeal for reversing the conviction on the basis of an issue not

raised by Bagosora. Furthermore, Judge Pocar insisted that while the Chamber interpreted the indictment as implying a specific order of events, the indictment does not actually specify whether the sexual assault occurred before or after the murder. Through this reasoning, Judge Pocar concluded that Bagosora had proper notice of the charges against him and was not prejudiced by the wording of the indictment.

Finally, with respect to sentencing, the Appeal Chamber acknowledged that while it had reversed many of the instances in which Bagosora had been held individually criminal liable for ordering certain attacks, it affirmed his responsibility for these acts as a superior. Noting that superior responsibility is considered no less grave than individual responsibility, it concluded that this alone would not result in a change in sentence. However, the Appeals Chamber cited the reversal of Bagosora's conviction for the sexual assault on the Prime Minister as well as the reversal of his conviction for murder as a crime against humanity (based on the fact that this conviction was cumulative with the extermination conviction) as reasons for the decrease in his sentence.

The Appeals Chamber also revisited the sentence of Nsengiyumva. As in the case of Bagosora, while the Appeals Chamber granted Nsengiyumva's appeal on the issue of ordering, it found Nsengiyumva guilty of the same crimes under the doctrine of superior responsibility, thus resulting in no change to his sentence on these grounds. However, it did lower his sentence based on the reversal of his conviction for murder as a crime against humanity in relation to the April 7, 1994, killings in Gisenyi town because the Chamber found it was based on the same acts as the conviction for extermination as a crime against humanity and was, therefore, cumulative.

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THE PROSECUTOR V. ILDÉPHONSE NIZEYIMANA, CASE NO. ICTR-2000-55C-T

On June 19, 2012, Trial Chamber III of the International Criminal Tribunal for Rwanda found Ildéphonse Nizeyimana guilty on three charges: genocide; extermination and murder as crimes against humanity; and murder as a serious violation of Article 3 Common to the Geneva Conventions and Additional Protocol II. The Chamber found that beginning in April 1994, Nizeyimana participated in a series of joint criminal enterprises to kill Tutsis and that he also bore superior responsibility for all but one of the proven killings. Notably, however, the Chamber acquitted Nizeyimana of rape as a crime against humanity and a war crime.

As a Captain at the *École des Sous-Officiers (ESO)*, a military-training school in Butare, Nizeyimana served as the intelligence and operations officer. Although he was under the *de jure* command of Lieutenant-Colonel Tharcisse Muvunyi, the Chamber concluded that Nizeyimana exercised authority consistent with an unofficial role as second in command at the ESO. Acting in this capacity, Nizeyimana was found to have planned and authorized the killings of thousands of Tutsi refugees at Cyahinda Parish. Nizeyimana was also found to have participated in the establishment of roadblocks intended to identify and kill Tutsis, including the direct order to kill Remy Rwekaza and Beata Uwambaye, as well as in the attacks in the Butare Prefecture that killed Queen Rosalie Gicanda, Professor Pierre Claver Karenzi, Prosecutor Jean-Baptiste Matabaro, Sub-Prefect Zéphanie Nyirinkwaya, and members of the Ruhutinyanya family.

In considering the evidence of the killings, the Chamber distinguished the large-scale attack on Cyahinda Parish, in which thousands of civilians—predominantly Tutsis—were massacred, and found it to constitute extermination as a crime against humanity. However, the Chamber found the other instances that involved the killings of the individuals and families constituted the more narrow crime of murder. The Trial Chamber noted that while "there is no numerical threshold in establishing extermination, case law emphasises that the killings

must occur on a large or mass scale.” Ultimately, with respect to the individuals and families killed, the Chamber concluded that “the number of deaths in each instance [was] too ambiguous or too low to establish killing on a large scale,” and, thus, to amount to extermination. In reaching its conclusion, the Chamber cited the *Bagosora and Nsengiyumva* Appeal Judgment, in which the Appeals Chamber found that the large scale requirement could not be satisfied based on a collection of events “in different prefectures, in different circumstances, by different perpetrators, and over a period of two months.” However, the Appeals Chamber in *Bagosora and Nsengiyumva* also found that a series of specific killings within Gisenyi Town that were perpetrated in parallel with other killings throughout the town at the same time could be aggregated to establish the crime of extermination. Nevertheless, the Chamber arrived at its determination without resorting to a consideration of Nizeyimana’s murder convictions collectively or an analysis of the geography and timing of the smaller-scale killings.

In addition to widespread killings of Tutsi civilians where the Chamber held Nizeyimana guilty, the Prosecutor was less successful with charges stemming from instances of rape and other sexual violence crimes at the hands of

ESO soldiers over which the Prosecutor claimed Nizeyimana exercised effective control. A major obstacle for the Prosecution in this case was the mixture of soldiers present at, and participating in atrocities: ESO soldiers—over which Nizeyimana exercised sufficient effective control in many instances—intermingled with Presidential Guard soldiers and gendarmerie, leading to confusion with regard to which soldiers committed which crimes and under whose command they were operating. Thus, the Trial Chamber was unable to conclude beyond a reasonable doubt that ESO soldiers involved in the killings and rapes at Butare University were at that time under Nizeyimana’s control as opposed to Presidential Guard superiors.

The insufficiency of evidence of Nizeyimana’s control also arose in the Chamber’s ruling regarding an attack on Butare University Hospital, where the Prosecutor alleged Nizeyimana bore superior responsibility for the rape and murders of Tutsis who sought treatment and refuge. The Chamber found that Presidential Guard soldiers began arriving at the hospital in mid-April and that these soldiers played a role in the violence against Tutsis at the hospital. Because of the presence of soldiers under two distinct chains of command, the Trial Chamber concluded that the civilian witnesses were unlikely to have been

able to distinguish between ESO and Presidential Guard soldiers, noting that, “[w]hile the first-hand evidence of rapes by soldiers . . . raises the reasonable possibility that ESO soldiers raped Tutsis at the Butare University Hospital, it is not the only reasonable conclusion.” Thus, the Trial Chamber found the evidence insufficient to hold that Nizeyimana possessed superior responsibility for the crimes committed at the hospital.

As a result of Nizeyimana’s convictions for genocide, crimes against humanity, and war crimes, he was sentenced to life in prison. Considerations that led the Trial Chamber to impose this sentence included the large number of deaths involved (especially at Cyahinda Parish), the abuse of his authority, and the gravity of his crimes. Because his convictions for these three categories of crimes were all based on the same acts, he was given a single sentence addressing all the counts rather than three consecutive sentences, as the Prosecution had requested.

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