

CRIMINAL COURTS AND TRIBUNALS

INTERNATIONAL CRIMINAL COURT

FOURTH STATE PARTY TO THE ROME STATUTE RATIFIES CRIME OF AGGRESSION AMENDMENT

Luxembourg recently became the fourth State Party of the International Criminal Court (ICC, Court) to ratify amendments to the Rome Statute that were adopted in a historic consensus at the 2010 Review Conference of the International Criminal Court in Kampala, Uganda. The January 15, 2013 ratification brings the controversial amendments another step closer to entering into force. If the requisite number of states ratify the proposed amendments, the ICC's jurisdiction would dramatically increase in scope, likely having profound global implications for current armed conflicts.

Although the Rome Statute included the crime of aggression within the Court's jurisdiction at its inception, the Court has been unable to exercise its jurisdiction as the original Statute failed to define the crime or its jurisdictional boundaries. The inclusion of the crime of aggression in Article 5, while lacking a functional definition and jurisdictional details, was part of a compromise reached during the negotiation of the Rome Statute in 1998. However, on June 11, 2010, the delegates of the Review Conference of the Rome Statute adopted amendments that included a definition of the crime of aggression and established conditions for the Court's jurisdiction.

The amendments adopted in Kampala include Article 8 which defines the crime of aggression for the purpose of the Rome Statute. The text of Article 8(1) states that the crime of aggression must be conducted by a person effectively controlling the political or military action of a state and is "the planning, preparation, initiation or execution [...] of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations." The term "act of aggression" is defined in Article 8(2) *bis* as the "use of armed force by a State against the sovereignty, territorial

integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations." Notably, this definition refers back to the UN Charter throughout the text, reflecting compromises made to limit the scope of the definition.

The adopted amendments also include Article 15 *bis* and 15 *ter*, the conditions for the Court's exercise of jurisdiction over the crime of aggression. According to Article 15 *bis*, for the crime of aggression, the prosecutor could only open an investigation *proprio motu* or one based on a state referral of a situation, after ascertaining whether the UN Security Council has made a determination of an act of aggression committed by the state concerned. If the Security Council has made such a determination, then the prosecutor may initiate the investigation. If the Security Council has not made such a determination within six months of the date of notification, then the prosecutor may commence the investigation only if the Pre-Trial Chamber has authorized it and the Security Council has not decided against recognition of an act of aggression.

The idea of a crime of aggression, while treated as a novel idea by many States Parties to the Rome Statute, is not at all a new concept within international law. Article 1 of the 1928 Kellogg-Briand Pact, known as the General Treaty for the Renunciation of War, declared, "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another." With the commencement of the Nuremburg Tribunal in 1950, an international court actually applied its jurisdiction to the crime of aggression though it used the term "crimes against peace." The definition of crimes against peace adopted in the Nuremburg principles comprises "planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances."

Along with the ideas promulgated at Nuremburg, the UN Charter, adopted in 1945, prohibited the use of armed force against another state in Article 2(4). Although international law had customarily protected the sovereignty of states, including their right to use armed force against another, the UN Charter, along with Nuremburg, suggest an evolving intent to limit the legitimate use of armed forces to situations of self-defense, although international humanitarian law has yet to place such strict limits in all cases. The new amendments to the Rome Statute would take steps toward reinforcing these limitations on the use of armed force and can be seen as an attempt to further the principles endorsed by Nuremburg—the end to global conflicts that result in mass casualties and the ability to hold individuals accountable for their actions in these atrocities.

ICC WITHDRAWS CHARGES AGAINST FORMER KENYAN OFFICIAL

The International Criminal Court's (ICC) Prosecutor, Fatou Bensouda, filed a motion in March 2013 to drop all charges against Francis Kirimi Muthaura, the former Head of the Public Service and Secretary to the Cabinet of the Republic of Kenya, a co-accused of Kenya's recently elected President, Uhuru Kenyatta. Muthaura and Kenyatta were jointly accused of five counts of crimes against humanity for their alleged involvement in authorizing and organizing the wave of violence that swept through Kenya following contested presidential elections in late 2007. All five counts are included in Article 7(1) of the Rome Statute of the ICC, which defines crimes against humanity as certain acts "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." Specifically, Muthaura and Kenyatta were charged with murder, deportation or forcible transfer, rape, persecution, and other inhumane acts resulting in the death of more than 1,000 civilians and the displacement of more than 600,000 more. In Bensouda's statement on the notice to withdraw charges against Muthaura, she stressed that it was

her duty to do so when there is no longer a reasonable prospect of conviction at trial.

In the wake of the worst unrest in Kenya since its independence in 1963, Muthaura has been accused of authorizing police to use excessive force against protesters, protected members of the Party of National Unity's youth militia, and also of attending meetings in which attacks on civilians were planned. On March 31, 2010, the Pre-Trial Chamber II granted the prosecution's request to initiate an investigation into crimes of humanity committed by Muthaura and Kenyatta. Subsequently, the case was referred to Trial Chamber V on March 29, 2012. Under Article 61(9) of the Rome Statute, "after commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges" against the accused. There is no further guidance within the Statute itself on what conditions must be met for the withdrawal of charges or how charges are withdrawn procedurally. On March 11, 2013, Bensouda issued a statement on her notice to withdraw charges against Muthaura, in which she cited several reasons for the withdrawal, including witnesses' death or refusal to testify due to fear, the lack of support from the government of Kenya in providing critical evidence and facilitating access to witnesses, and most importantly the fact that the key witness—witness number four—recanted a crucial part of his statement and admitted to accepting bribes.

Bensouda stressed that this decision has no bearing on the charges against President-elect Kenyatta, and stated: "My decision today is based on the specific facts of the case against Mr. Muthaura, and not on any other consideration. While we are all aware of political developments in Kenya, these have no influence, at all, on the decisions I make as the Prosecutor of the International Criminal Court." However, at the hearing in which Trial Chamber V officially dropped the charges against Muthaura, Kenyatta's lawyers urged the Chamber to drop the charges of crimes against humanity against their client, claiming the charges were based on hearsay and were fundamentally flawed. According to Article 27 of the Rome Statute, should Kenyatta take office while there are still charges against him at the ICC, he will not receive any type of head of state immunity. Kenyatta's lawyers have argued that the entire case should be

returned to the Pre-Trial Chamber because the prosecution's case has changed drastically in the past year as certain evidence no longer exists and a high percentage of new evidence and undisclosed witnesses have been offered. Lawyers representing victims of the violence fear that if Kenyatta does take power, there could be widespread retaliation for cooperating with the prosecution and serious danger for witnesses against him.

The democratic election of an alleged criminal accused of grave human rights abuses presents a seemingly monumental problem for the International Criminal Court, which has had a shaky history since its inception ten years ago. Many have criticized the Court as being too African-focused, not effective enough, and an enduring symbol of western colonialism—criticisms Kenyatta capitalized on in the election by using his indictment as a way to gather popular support. The decision of the Prosecutor to withdraw the charges against Muthaura due to lack of evidence could be seen as an example of the inefficiencies of the Court. However it could also serve as an important reminder about the rule of law and the protections of defendant's rights that are essential to any fair justice system.

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INTERNATIONALIZED CRIMINAL TRIBUNALS

WITNESS IDENTITY LEAKS IN THE SPECIAL TRIBUNAL FOR LEBANON LEAD TO INVESTIGATION AND POSSIBLE CONTEMPT CHARGES

The Special Tribunal for Lebanon (STL) came under political scrutiny in January for leaking the identities of witnesses in the upcoming trials surrounding the 2005 assassination of former Lebanese Prime Minister Rafiq Hariri. The source of the leak is unknown, although the names, photographs, and identifying information of the witnesses were published in the local *Al Akhbar* newspaper, known for being aligned with the Hezbollah movement in Lebanon. The STL quickly issued a statement in which it "denounce[d] in the strongest possible terms any attempts at witness intimidation." *Al Akhbar*, in an

article titled *The STL Witness List: Why We Published*, justified the release of the names and photographs, saying that the public has a right to know the identities of those testifying against the accused. Concerns about witness intimidation further complicate public opinion regarding the already-controversial trial, which will try the four accused *in absentia*.

In April 2013, the Pre-Trial Judge determined that these leaks likely constituted contempt of court and asked the President of the tribunal to refer the matter to a Contempt Judge. In accordance with a March 2013 calendar assigning one Contempt Judge and one Appeals Panel for each month of the year, the President of the STL, Judge David Baragwanath, was designated as the Contempt Judge in this matter. After the April 25, 2013, hearing on the contempt allegations, Judge Baragwanath issued a decision ordering the appointment of an independent *amicus curiae* to investigate the source of the leaks and those who published the confidential information. Rule 60 *bis* allows the STL to hold individuals found in contempt of court, meaning those who "knowingly and willingly interfere with its administration of justice" or "those who threaten and intimidate witnesses," responsible through sentences up to seven years in prison and fines up to 100,000 Euros.

Other international criminal tribunals have suffered similar challenges to the proper administration of justice. Most notably, the International Criminal Tribunal for the former Yugoslavia (ICTY) faced comparable issues involving leaks and publication of witness names and identifying information. In the *Celebici* case, tried in 1997, the tribunal was adjourned for over a week while the Office of the Prosecutor investigated leaks. Although the prosecutor identified members of the defense counsel as the sources of the leak to the publication *Sloboda Hercegovina*, the President of the Tribunal, Judge Antonio Cassese, concluded that there was not enough evidence to hold defense attorneys in contempt of court. However, Judge Cassese noted that the defendant, Zejnir Delalic, may have spoken to the press himself and, in doing so, may have been in contempt of court. The tribunal accepted Judge Cassese's findings regarding the defense counselors but rejected the implication that Delalic should be investigated for contempt of court. In

2012, the Appeals Chamber of the ICTY affirmed former Serbian leader Vojislav Seselj's sentence of eighteen months in jail for publishing the names of protected who testified in his trial before the ICTY. The defendant disclosed the names and pseudonyms of witnesses on his website and in his 2007 book. The Contempt Trial Chamber found Seselj guilty of contempt of court in October 2011 and ordered that the defendant remove the names and the book from his website.

Witness testimony before international criminal tribunals in cases of war crimes and crimes against humanity is essential to the pursuit of the truth and the administration of justice, but it can also be dangerous and difficult. The individuals on trial may be politically or militarily powerful, and witnesses risk being identified when they agree to testify before an international tribunal. For this reason, the STL's Rules of Procedure and Evidence strictly outline witness protection procedures, which become effective as soon as individuals enter their applications to become witnesses. From this moment onward, the tribunal incurs a duty to "ensure security, safety and protection of victims and witnesses, as well as to respect their confidentiality" and the tribunal becomes responsible for implementing "protective measures to ensure witnesses are able to testify in court without fears about their safety, security, and confidentiality." Rule 133 of STL's Rules of Procedure and Evidence outlines steps to guard the identity of the witnesses, including the use of pseudonyms in written accounts of the trial, facial distortion in public broadcast of the proceedings, and voice distortion in public broadcast. To limit the exposure during the trial, the proceedings are generally closed to the public during the presentation of evidence, and witnesses are permitted to give testimony via video link instead of being present in the courtroom. In an effort to decrease the opportunity for disclosure, identifying information is expunged from the public record, including the court transcript, and the chamber may limit the time each party has access to the identities of the witnesses of the opposing party. If counsel for either side feels that the witness is at imminent risk of death or serious harm, he or she may apply to the registrar for entry of the witness into the tribunal's protection program, under which the individual would then be

relocated. Failures to respect or protect confidentiality may result in contempt of court, which potentially includes jail time.

Although the trial was set to begin at the end of March, the STL indicated that these leaks along with delays in disclosure of evidence, required the tribunal to postpone the hearing, and the case is still in the pre-trial phase.

FRENCH COURT INVOKES UNIVERSAL JURISDICTION IN RWANDAN GENOCIDE CASE

In early April 2013, French prosecutors announced the domestic trial of a former captain in the Rwandan army for his alleged involvement in the 1994 Rwandan genocide. Citing universal jurisdiction, prosecutors charged Pascal Simbikangwa, who was arrested in 2008 by French officials under an international arrest warrant, with the crimes of "complicity in genocide" and "complicity in crimes against humanity." This trial marks the first attempt by the French government to prosecute anyone in connection with the Rwandan genocide. The trial order is a response to a complaint filed by a group formed by Rwandans living in France called the Collective of Civil Plaintiffs for Rwanda (CPCR). Simbikangwa was a captain and intelligence officer with the Rwandan military under the former Hutu president Juvenal Habyarimana, whose assassination triggered the mass atrocities throughout the nation. French prosecutors accuse Simbikangwa of being a member of *Akazu*, a Hutu group of extremists believed to have planned and executed the genocide. Simbikangwa is also accused of arming the *Interahamwe* Hutu militia and facilitating the massacre of Tutsis.

Universal jurisdiction, the doctrine under which certain crimes can be adjudicated in states in which the alleged crime was not committed, usually only applies if the judicial system that would have jurisdiction is unable or unwilling to conduct a fair and independent trial. While this was the scenario that led to the creation of the ICTR, with the tribunal's mandate coming to an end and the transfer of cases to Rwandan domestic courts, this is no longer the case.

France has repeatedly refused to extradite genocide suspects to Rwanda based on the belief that detainees would not receive a fair trial. However, instead of referring

cases directly to the International Criminal Tribunal of Rwanda (ICTR), in 2010 France created a unit of its Prosecutor-General's Office tasked with investigating suspects' involvement in the genocide for proceedings within the French judicial system. Even after the official transfer of the ICTR's cases to Rwanda's domestic courts, France officially indicted Simbikangwa in its own courts. Simbikangwa's attorneys have not yet responded to the French trial order, and it is unclear whether they will attempt to appeal the decision and challenge France's jurisdiction.

Although the application of universal jurisdiction to prosecute genocide suspects in domestic courts is not common, similar indictments have been issued in the past, leading to successful—though controversial—trials, such as those conducted in Belgium in 2001. The Belgium trial marked the first time that a jury was asked to make a determination of guilt for violations of international humanitarian law in another country. However, France's choice to try a Rwandan genocide suspect in its domestic courts is particularly unusual in 2013 because experts within the ICTR and the United Nations have determined Rwanda's domestic courts to be capable of providing fair and independent hearings for genocide suspects. The ICTR also transferred its documents and mandate to an intermediate court called the Mechanism for International Criminal Tribunals (MICT). The MICT is responsible for concluding the remaining cases open regarding crimes committed in Rwanda and in the former Yugoslavia. In November 2012, Emmanuelle Ducos, the vice president of the French tribunal dealing with Simbikangwa, formally requested access to all confidential materials the ICTR, and now the MICT, possess concerning the suspect. The MICT prosecutor did not object to the request and the judge, in a ruling on December 20, 2012, permitted the French tribunal access to some documents while requiring witness consent to release others. According to this ruling, Simbikangwa's case is no longer pending before the ICTR or the MICT, meaning that it is among the cases transferred to Rwandan domestic courts for prosecution.

France's decision to issue the trial order was welcomed by Rwandan advocacy groups; however, it also triggered calls for further commitment to prosecution. Jean de Dieu Mucyo, executive secretary

of the National Commission Against the Genocide, pointed to France's refusal to arrest and prosecute other genocide suspects in the state. In particular, Rwandan groups have tried to put pressure on France to arrest and prosecute Agathe Habyarimana, the wife of former Rwandan president Juvenal Habyarimana. She is believed to have chaired the Akazu and

used her economic and political influence to encourage the killing of Tutsis. Last year, France granted her permanent residency. As Simbikangwa's trial moves forward, Rwandan anti-genocide organizations, as well as Rwandan citizens throughout Europe, will assess this prosecution's implications for the future relationship between France and Rwanda as well as

the success of any potential proceedings against Simbikangwa in Rwandan domestic courts.

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JUDGMENT SUMMARIES: INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

GASPARD KANYARUKIGA V. THE PROSECUTOR, APPEALS JUDGMENT, CASE NO. ICTR 02-78-A

On May 8, 2012, the Appeals Chamber for the International Criminal Tribunal for Rwanda (ICTR) affirmed Trial Chamber II's conviction of Gaspard Kanyarukiga for planning genocide and extermination as a crime against humanity based on his role in the destruction of the Nyange church on April 16, 1994, which resulted in the deaths of approximately 2,000 Tutsi civilians. The Appeals Chamber also affirmed his thirty-year sentence of imprisonment.

Notably, Kanyarukiga asserted a total of 72 grounds of appeal. Challenges were grouped into four categories: alleged violations of Kanyarukiga's fair trial rights, alleged errors relating to the indictment, alleged errors related to the rejection of the accused's alibi, and claims that the Trial Chamber engaged in faulty assessments of the evidence. With regard to the challenges based on alleged violations of the accused's fair trial rights, Kanyarukiga claimed, *inter alia*, that the Trial Chamber improperly denied his request for a stay of proceedings, which had been based on the argument that three *laissez-passeurs* seized from the accused at the time of his arrest had disappeared, making it impossible for the accused to establish his alibi defense. In response, the Appeals Chamber noted that the Trial Chamber was not convinced that the evidence had in fact been seized from the accused and that, in any event, the accused could establish his alibi defense through other evidence, meaning that there was no abuse of process such that proceeding with the trial would "contravene the

court's sense of justice, due to pre-trial impropriety or misconduct." The Appeals Chamber agreed, concluding that the lower court had not abused its discretion by not ordering the requested stay and noting that the burden was on the defense to show that the accused had suffered an abuse of process that damaged his fair trial rights. The Appeals Chamber similarly rejected claims from the defense that his fair trial rights were damaged by the Trial Chamber's alleged setting of arbitrary time limits on the defense's cross-examinations or by the failure to issue timely rulings on challenges to the admissibility of prosecution evidence. Again, the Appeals Chamber found that these grounds were insufficient because the defense failed to show that the Trial Chamber erred in exercising its discretion and that the defense was prejudiced as a result.

Concerning the alleged errors relating to the indictment, the Appeals Chamber dismissed all but one of the defense's challenges. Specifically, the Appeals Chamber upheld Kanyarukiga's claim that the prosecution erred by failing to allege in the indictment that Kanyarukiga had engaged in a conversation with another ICTR accused, Clément Kayishema, concerning the destruction of the Nyange church. According to the Appeals Chamber, this conversation constituted a material fact that, along with others, underpinned Kanyarukiga's conviction for planning genocide and extermination. The Appeals Chamber then recalled that the prosecution is required to identify in the indictment the "particular acts" or the "particular course of conduct" on the part of the accused that formed the basis for the charge in question. The absence of this information rendered the indictment faulty. However, the Appeals Chamber concluded that, because the prosecution did properly include in the indictment allegations relating to another

"planning" conversation that took place the following day, there was sufficient basis for the Trial Chamber's holding that Kanyarukiga was responsible for planning the destruction of the church. Thus, the lower court's judgment was affirmed.

The defense's challenges based on alleged alibi error failed due to the broad discretion afforded to the Trial Chamber in evaluating factual information presented at trial, with the Appeals Chamber stressing that a "Trial Chamber need not explain every step of its reasoning." Lastly, the Appeals Chamber dismissed the allegations that the Trial Chamber improperly evaluated the evidence, a claim that largely rested on challenges to the lower court's decisions regarding witness credibility and treatment of corroborating statements. On this subject, the Appeals Chamber stressed that the Trial Chamber is best placed to observe a witness's demeanor during testimony and to resolve any inconsistencies that may arise within or amongst witnesses' testimonies, particularly given that the Trial Chamber can consider whether the evidence taken as a whole is reliable and credible. The Appeals Chamber further held that the testimony of two witnesses may be found to corroborate one another if the two testimonies are "compatible" regarding a fact or sequence of facts, and that it is not necessary that the testimonies be identical in all aspects.

In addition to rejecting the vast majority of the defense's various grounds of appeal, the Appeals Chamber rejected the prosecution's appeal that the Trial Chamber erred in failing to sentence the accused to life in prison. The Appeals Chamber found that a "sentence of [thirty] years' imprisonment may be considered among the most severe sentences," and that it was not "so unreasonable or plainly unjust" to

require the Appeals Chamber's intervention. The prosecution also appealed the Trial Chamber's finding that the evidence proving that Kanyarukiga *planned* the destruction of the Nyange church was insufficient to establish that he "significantly contributed" to the destruction of the church, which led the Trial Chamber to conclude that it could not convict the accused for participating in a joint criminal enterprise aimed at destroying the church. The majority of the Appeals Chamber declined to rule on this ground of appeal, noting that the prosecution did not seek to invalidate the lower court's verdict but simply sought "clarification on an issue of general importance to the development of the Tribunal's case law." However, Judge Pocar did write a Separate Opinion, offering the clarification sought by the prosecution. He noted that the Appeals Chamber has the discretion to "hear appeals where a party has raised a legal issue that would not invalidate the judgment," and explained that "the clarification of [the] issue will avoid uncertainty and confusion in future cases." Judge Pocar began his Separate Opinion by recalling that all three categories of joint criminal-enterprise liability share the following constitutive elements: (i) a plurality of persons; (ii) the existence of a common plan, design or purpose that amounts to or involves the commission of a crime provided for in the ICTR Statute; and (iii) the participation of the accused in the common purpose. He then explained that the last element, participation, does not require the commission "of a specific crime" but rather "may take the form of assistance in, or contribution to, the execution of the common purpose." In this case, as Judge Pocar recalled, the Trial Chamber determined that "the requisite contribution would have been met if Kanyarukiga had 'ordered, instigated, encouraged or provided material assistance to the attackers'" at the church, but that his role in planning the attack was insufficient. Judge Pocar disagreed with this conclusion, noting that the Appeals Chamber for the International Criminal Tribunal for Yugoslavia held in the *Tadić* case that "[a]lthough only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and

contribution of the other members of the group is often vital in facilitating the commission of the offence in question." Indeed, according to Judge Pocar, planning a crime involves "designing the criminal conduct" constituting the statutory crimes "that are later perpetrated." Thus, in his opinion, planning a crime may amount to a significant contribution to the execution of a common purpose.

Ultimately, having rejected the majority of appeals from both the prosecution and the defense, the Appeals Chamber affirmed Trial Chamber II's conviction of Kanyarukiga for planning genocide and extermination as a crime against humanity, as well as his thirty-year sentence of imprisonment.

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ALOYS NTABAKUZE V. THE PROSECUTOR, APPEALS JUDGMENT, CASE No. ICTR-98-41A-A

On May 8, 2012, the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) issued a decision on the appeal of Aloys Ntabakuze, the Commander of the Para-Commando Battalion of the Rwandan Army. Trial Chamber I had convicted Ntabakuze based on its findings that he bore superior responsibility for a number of crimes and sentenced him to life imprisonment. Specifically, the lower court convicted the accused of genocide; the crimes against humanity of extermination, persecution, murder, and other inhumane acts; and violence to life as a serious violation of the Geneva Convention and its Additional Protocol II, as incorporated into the ICTR statute. The convictions were based on three different incidents that occurred in April 1994: (i) the killing of Tutsis in the Kabeza area of Kigali on April 7–8; (ii) the killing of Tutsis on Nyanza Hill on April 11; and (iii) the killing of Tutsis at the *Institut Africain et Mauricien de Statistiques et d'Économie Appliquée* (IAMSEA) in the Remera area of Kigali on April 15. On appeal, the

Appeals Chamber unanimously reversed Ntabakuze's conviction for other inhumane acts as a crime against humanity based on the events at Nyanza Hill, and a majority of the Chamber reversed his convictions for genocide, crimes against humanity, and war crimes in relation to the killings in Kabeza. Based on these holdings, the Appeals Chamber vacated Ntabakuze's life sentence, replacing it with a term of 35 years' imprisonment.

Ntabakuze appealed his conviction on 37 grounds. Notably, Ntabakuze claimed that his rights to a fair trial had been violated in a number of ways, including the prosecution's failure to properly inform him of the charges against him until the end of trial and the prosecution's failure to observe disclosure obligations. He also claims that in convicting him, the Trial Chamber "relied solely on unreasonable and hypothetical inferences in violation of the principle of innocence." However, the Appeals Chamber dismissed each of these claims, finding that the defense was not able to substantiate any of them.

Ntabakuze also claimed that his right to be tried without undue delay had been violated, stressing that he had been detained twelve years by the time he filed his Notice of Appeal. In response, the Appeals Chamber recognized the "substantial length of the proceedings in the case," but noted that the Trial Chamber had already rejected the defense's claim that his right to a speedy trial had been violated in light of the "size and complexity of the trial." According to the Appeals Chamber, the mere length of the accused's detention did not show that the Trial Chamber erred in reaching this conclusion.

Another set of challenges brought by the defense involved challenges to the indictment. Specifically, Ntabakuze alleged that the prosecution erred in not putting him on notice regarding material facts underpinning the charges against him or regarding the mode of liability upon which the prosecution based its case. Before turning to the particulars of these claims, the Appeals Chamber recalled 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,” and that whether a fact is “material” depends “on the nature of the [p]rosecution’s case.” The Chamber also noted that a defective indictment may be “cured” if “the [p]rosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charge.” Turning to the defense’s specific claims, the Chamber found that although the indictment was in fact defective with respect to the charge that the accused bore superior responsibility for killings committed in the town of Kabeza, the prosecution had cured the defect through information submitted in its Pre-Trial Brief and the Supplement thereto. However, the Appeals Chamber also found that the indictment failed to inform Ntabakuze that the prosecutor was charging him as a superior for the crime against humanity of other inhumane acts based on his role of preventing refugees who were killed at Nyanza Hill from seeking sanctuary before being taken to the hill. Furthermore, it found that the prosecution did not cure this defect by presenting appropriate information regarding this charge in subsequent filings, and that the prosecution failed to prove that this lack of information did not prevent Ntabakuze from preparing an adequate defense to the charge. Accordingly, the Appeals Chamber vacated the lower court’s conviction of Ntabakuze for the crime against humanity of other inhumane acts. The Appeals Chamber also found that, although the prosecution generally provided the accused with sufficient notice that he was being charged under a theory of superior responsibility for the actions of Para-Commando soldiers who belonged to the battalion led by Ntabakuze, the prosecution failed to sufficiently allege that he was responsible for the acts of certain militiamen who committed acts alongside these soldiers.

Thus, the Appeals Chamber reversed the Trial Chamber’s findings to the extent they relied on the actions of militiamen, although this holding did not wholly vacate any of the convictions because each of the charges for which the accused was convicted were supported by multiple allegations.

In addition to successfully challenging certain aspects of the prosecution’s charging strategy, the defense convinced a majority of the Appeals Chamber that the Trial Chamber erred in concluding that Ntabakuze bore superior responsibility for the killings carried out by soldiers at Kabeza. Specifically, while the majority found that the Trial Chamber acted within its discretion in concluding that the killings were carried out by members of the Para-Commando Battalion, it was not satisfied that the lower court adequately addressed evidence put forward by the defense suggesting that certain members of the Battalion were serving under a commander other than Ntabakuze. Because it was not clear from the evidence which company of the battalion carried out the relevant attacks, the majority of the Appeals Chamber vacated the Trial Chamber’s convictions to the extent they were based on actions carried out at Kabeza. In a dissenting opinion, Judges Pocar and Liu explained that they were satisfied with the Trial Chamber’s assessment of the evidence that led it to conclude Ntabakuze exercised effective control over the perpetrators of the attacks in Kabeza, that the defendant knew that the attacks would be taking place, and that he failed to prevent them.

Finally, the Appeals Chamber dismissed each of the defense’s challenges to the Trial Chamber’s approach to sentencing, a claim which had asserted that the lower court erred (i) by choosing a single sentence based upon multiple

convictions for the same acts; (ii) by “double-counting” the accused’s role as a superior both in determining his responsibility for the crimes and as an aggravating factor, as well as the number of victims at Nyanza Hill in considering the gravity of the accused’s crimes and as an aggravating factor; and (iii) by abusing its discretion by imposing a life sentence. With regard to the first claim, the Appeals Chamber stressed that the “primary goal in sentencing is to ensure that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of the offender,” and it held that there was nothing suggesting that the Trial Chamber had not adduced its sentence according to these principles. In relation to the second claim, the Appeals Chamber disagreed with the defense’s assessment that the Trial Chamber had “double-counted” the relevant factors, noting that the mere discussion of these factors in its assessment of the sentence does not mean they were relied upon by the Chamber more than once. Lastly, the Appeals Chamber held that, based on its holdings at trial, the lower court acted within its discretion to impose a life sentence, despite the fact that the defense offered a number of mitigating factors and even though Ntabakuze was convicted on the basis of superior responsibility rather than direct perpetration. Nevertheless, given the fact that the majority of the Appeals Chamber vacated a number of the Trial Chamber’s convictions, as discussed above, it reduced Ntabakuze’s sentence from life imprisonment to a term of 35 years.

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