301. First, the ICC Statute in general, and the modes of liability scheme in particular, were never meant to codify customary international law.[812] The ICC has itself stated that whether the Statute conforms to customary international law is irrelevant for the purposes of its interpretation. In the *Katanga* Confirmation Decision, the Pre-Trial Chamber noted that the ICTY Appeals Chamber had expressly found in *Stakić* that co-perpetratorship is not a mode of liability under international customary law, but:

> since the Rome Statute expressly provides for this specific mode of liability, the question as to whether customary law admits or discards the 'joint commission through another person' is not relevant for this Court.[813]

302. Secondly, no case at the ICC has yet defined the elements of Article 25(3)(c) liability. The confirmation hearing in *Mbarishimana*, cited by Taylor, merely referred to the article in passing as *Mbarishimana* was not charged under 25(3)(c).[814] Taylor quotes Ambassador Scheffer stating that the "purpose" language was a compromise reached during negotiations for the Rome Statute between those favouring wording with "knowledge" and those favouring "intention."[815] But Scheffer himself makes the point that "the Statute never defines 'purpose' and the legislative history provides no guidance."[816]

303. Third, Taylor's attempt to depict Article 25(3)(c) of the ICC Statute as identical to aiding and abetting in Article 6(1) of the SCSL Statute is misguided. The ICC has its own unique scheme of individual criminal responsibility and is still in the early stages of developing these modes in its jurisprudence. "Planning", for example, is not mentioned in the ICC Statute although it is a recognised mode of liability under international criminal law. Under the ICC scheme, acts that assist or encourage a crime are not limited to paragraph (c) of Article 25(3) but would also be covered by paragraph (d) of the same provision.[817]

304. While Article 25(3)(d) uses the term "common purpose", it is very different from joint criminal enterprise liability as the accused need not be part of the criminal plan nor intend any

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[812] See *Orić* AJ, Judge Shomburg Opinion, para. 20: the Rome Statute is specific to the jurisdiction of the ICC and "was not intended to codify existing customary rules"; see also *Exxon Mobil*, p. 42: "The Rome Statute which created the International Criminal Court ("ICC") is properly viewed in the nature of a treaty and not as customary international law."

[813] *Katanga* Confirmation Decision, para. 508.

[814] *Mbarishimana* Confirmation Decision, para. 8.

[815] Taylor Appeal, para. 341.

[816] See Talisman Amicus, p. 20.

[817] Article 25(3)(d) provides that a person is criminally responsible for crimes under the Rome Statute if he "[i]n any other way *contributes* to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal aim or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the court; or (ii) Be made in the *knowledge* of the intention of the group to commit the crime." (Emphasis added.)

crime.[818] Because ICC jurisdiction is "limited to the most serious crimes of concern to the international community",[819] it is highly probable that every case at the ICC will concern crimes committed by a group of persons acting with a common purpose as such crimes could not be committed by individuals acting alone. Article 25(3)(d) makes an individual responsible for providing any assistance to a crime within the ICC's jurisdiction when the contribution is "made in the knowledge of the intention of the group to commit the crime." Thus, exactly contrary to Taylor's submission,[820] the ICC Statute does indeed hold responsible those who contribute to a crime with mere knowledge of the intention of the perpetrators to commit the offence. Taylor's argument that state practice is reflected in the ICC Statute and rejects criminal responsibility for contributing to a crime with mere knowledge, is untenable in light of Article 25(3)(d), which holds persons criminally responsible who are not themselves part of a common plan, but who contribute with knowledge of the intention of the group to commit crimes.

305. What is clear is that the scheme of modes of liability in the ICC Statute is distinct from that of the SCSL and the *ad hoc* tribunals and does not, and never was intended to, reflect customary international law. Therefore, the ICC Statute is not helpful in understanding Article 6(1) of the SCSL Statute and provides no reason to reverse the jurisprudence of this Court in defining the elements of aiding and abetting liability.

(vii) Awareness of a "substantial likelihood" satisfies the knowledge test

306. The Trial Chamber correctly stated that the aider and abettor must possess the knowledge *or* be "aware of the substantial likelihood" that his acts would assist the commission of the underlying offence.[821] This Appeals Chamber has endorsed the "substantial likelihood" standard in *AFRC*,[822] *CDF*,[823] and *RUF*.[824] Appeals Chambers are bound to follow their previous decision absent cogent reasons that mandate a different holding in the interest of justice.[825] Taylor has failed to demonstrate the existence of any such reason to alter the jurisprudence of the Special Court, which is consistent with that of the Appeals

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[818] *Mbarushimana* Confirmation Decision, para. 282.
[819] Rome Statute, Art. 5.
[820] Taylor Appeal, para. 319.
[821] Judgement, para. 486.
[822] *AFRC* AJ, paras. 242, 243.
[823] *CDF* AJ, para. 366.
[824] *RUF* AJ, para. 546.
[825] *Aleksovski* AJ, paras. 108-11, 125. Instances of situations where cogent reasons in the interests of justice requires a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or where a previous decision has been given *per incuriam*, that is the judicial decision that has been wrongly decided, usually because the judges were ill-informed about the applicable law.

Chambers of the *ad hoc* tribunals by which it "shall be guided".[826] The standard articulated by this Appeals Chamber for the *mens rea* for aiding and abetting is proper, represents the standard test under customary international law, is consistent with the jurisprudence of other international tribunals and should not be disturbed.

307. The STL Appeals Chamber cited the *AFRC* definition of *mens rea* which included the "substantial likelihood" language, with approval, stating:

> This accords with fundamental principles of criminal law: if someone provides a gun to a well-known thug with the knowledge that it will be used (or is reasonably likely to be used) to commit a crime, he is liable for aiding and abetting whatever that crime is, regardless of whether he was fully aware of the specific crime the thug intended to perpetrate.[827]

308. The findings in the *Taylor* case, and Taylor's own testimony, show that the RUF was worse than a "well known thug." It was an organisation with a notorious operational strategy of terrorising innocent civilians, of which Taylor himself was well aware when he gave the group guns and ammunition that fueled its terror campaign. The STL Appeals Chamber noted the *Van Anraat* case before the Hague Court of Appeal relevant to the same principle of awareness of a probability of the commission of a crime:

> The accused had provided to Iraq, between 1980 and 1988, the chemical raw material TDG ... necessary for the manufacture of the mustard gas that the Iraqi Government had then used against the Kurds in 1987-88. The Court applied Dutch law ... [t]he Court first found that the accused knew that the quantity of TDG he provided could only be used to produce mustard gas and then found that the accused was aware of the high risk of the mustard gas in war, particularly given the 'unscrupulous character of the then Iraqi regime.'[828]

309. Taylor incorrectly submits that the ICTY never accepted that knowledge can include "awareness of a probability."[829] The *Blaškić* Appeals Chamber endorsed the statement made by the *Blaškić* and *Furundžija* Trial Chambers to the effect that:

> it is not necessary that the aider and abettor ... know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will *probably* be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.[830]

310. Taylor's submission misreads paragraph 49 of *Blaškić*, which did not overturn the probability standard.[831] Rather, the *Blaškić* Appeals Chamber fully endorsed the principle that

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[826] SCSL Statute, Art. 20(3).
[827] STL Applicable Law Decision, para. 227.
[828] STL Applicable Law Decision, fn. 345 (internal references omitted).
[829] Taylor Appeal, para. 371.
[830] *Blaškić* AJ, para. 50 (emphasis added).
[831] *Blaškić* AJ, para. 49.

the knowledge test is satisfied when it is shown that the aider and abettor was "aware that one of a number of crimes will *probably* be committed."[832] This probability standard has been consistently applied at the ICTY.[833]

311. Taylor's submission incorrectly asserts that the *Haradinaj* and *Blagojević* Appeal Judgements rejected the "awareness of a probability" standard.[834] In both *Haradinaj* and *Blagojević*, the Appeals Chamber found that the respective Trial Chambers did not impose a standard of 'certainty' but, rather, acquitted on the basis that the evidence did not show "to any standard" that the accused were aware their acts would assist the commission of a crime.[835]

312. ICTR jurisprudence also supports the principle that the knowledge element of *mens rea* is satisfied by evidence that the accused is aware a crime will probably be committed.[836] In *Karera*, the ICTR Appeals Chamber found that "[i]f an accused is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime."[837]

(viii) Taylor fails to show that the mens rea standard is "actual knowledge"

313. Taylor is mistaken in law in asserting that unless the assister can be said to have "actual knowledge" of the criminal intention of the principal, then the assistance is too remote.[838] No jurisprudence using the term "actual knowledge" is cited, nor does Taylor offer a definition of the term. If the term is meant to distinguish constructive knowledge, *i.e.*, a "should have known" standard, there is no relevance to this appeal as the Trial Chamber did not utilise a "should have known" standard.[839] In the event that Taylor suggests that by "actual knowledge" the aider or abettor must know for a "certainty" that the crimes will be committed, this is an incorrect statement of the law. When dealing with future events, no one can have absolute certainty. Regardless of how much information one possesses about past behaviour and declarations of intent, it is always possible that an individual or group will act to the contrary. Moreover, it would make no sense to impose a certainty standard for aiding and abetting when the test for instigating, ordering and planning is awareness of a substantial

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[832] *Blaškić* AJ, para. 50 (emphasis added).
[833] *Simić* AJ, para. 86; *FurundŽija* TJ, para. 246; *Brđanin* TJ, para. 272; *Strugar* TJ, para. 350.
[834] Taylor Appeal, paras. 370-71.
[835] *Haradinaj* AJ, para. 59; *Blagojević & Jokić* AJ, para. 223.
[836] *Ndindabahizi* AJ, para. 122 ("aiding and abetting a crime with awareness that a crime will *probably* be committed").
[837] *Karera* AJ, para. 321.
[838] Taylor Appeal, para. 385.
[839] Judgement, paras. 6878-79, 6886, 6947-52.

likelihood.[840] The correct *mens rea* standard is that which was articulated by this Appeals Chamber in three prior judgments and applied by the Trial Chamber in this case: the accused must know or be aware of the substantial likelihood that his conduct would assist the commission of the underlying offence.

(ix) There is no right of heads of states to aid and abet atrocities

314. Taylor's argument that the Trial Chamber's *mens rea* standard risks interfering with well-established prerogatives of states conflates state responsibility with international criminal responsibility.[841] Taylor in effect argues that Heads of State should be immune from criminal charges for aiding and abetting atrocity crimes because states have a right to provide assistance to insurgencies even with the knowledge that there is a substantial likelihood such acts will facilitate the commission of atrocities. No such principle exits in international law.

315. States have no right to assist crimes against humanity or war crimes. The International Court of Justice has held that Article 16 of the International Law Commission's Articles on State Responsibility reflects customary international law.[842] The Article provides:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
> (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
> (b) The act would be internationally wrongful if committed by that State.

316. Taylor's reliance on the International Court of Justice decision in the *Nicaragua* case as establishing a right of States to support insurgencies in other countries is misplaced.[843] The holding in *Nicaragua* provides no support for Taylor's argument that he had a right to support the RUF as part of his foreign policy, as the Decision found no such right under international law, deciding:

> that the United States by training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State.[844]

317. Taylor argues that the effect of the precedent in the *Taylor* case would be to criminalise assistance to any foreign group because there are reports that some of their forces have committed crimes. This argument ignores the fundamental findings of the Trial Chamber

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[840] *Blaškić* AJ, paras. 42 and 166 for ordering; *Kordić & Čerkez* AJ, paras. 30-32 and 112 for ordering, instigating and planning.
[841] Taylor Appeal, paras. 388-93.
[842] *Bosnia v. Serbia*, para. 420.
[843] See Taylor Appeal, paras. 388-90.
[844] *Nicaragua* Judgment, para. 292.

in this case about the notorious reputation of the RUF which distinguishes this case from any of the scenarios in Taylor's submission. There are over 500 pages in the Trial Judgement containing findings about the crimes committed by the RUF and its allies.[845] The Chamber found that "[t]hese crimes were inextricably linked to the strategy and objectives of the military operations themselves"[846] and that "[t]hroughout the Indictment period, the operational strategy of the RUF and AFRC was characterised by a campaign of crimes against the Sierra Leonean civilian population, including murders, rapes, sexual slavery, looting, abductions, forced labour, conscription of child soldiers, amputations and other forms of physical violence and acts of terror."[847] Taylor "knew of the atrocities being committed against civilians in Sierra Leone by the RUF and RUF/AFRC forces and of their propensity to commit crimes"[848] and "knew that his support to the RUF/AFRC would provide practical assistance, encouragement or moral support to them in the commission of crimes".[849]

318. Heads of State should not and do not enjoy immunity for acts that constitute crimes under international law.[850] This Appeals Chamber has already denied Taylor's claim to such immunity.[851] Under Taylor's argument, providing explosives to Al Qaeda knowing of their attacks targeting civilians, or providing guns to the Lord's Resistance Army, knowing of their well-documented practice of abducting children during military operations to serve in their forces, would be legal if the individuals providing this assistance were acting on behalf of a State. Fortunately, this is not the law. There is no principle in international law that grants officials of States the right to provide support to foreign groups that substantially assist crimes, aware of the substantial likelihood that the assistance will facilitate atrocity crimes. No principle of "state prerogative" grants immunity to Charles Taylor, who knew his assistance would lead to more enslavement, more amputations, rapes and the murders of thousands of innocent civilians in Sierra Leone.

(x) The mens rea need not be defined "in relation" to the actus reus

319. Taylor argues that the *mens rea* for aiding and abetting should be that the accused not only was aware he was contributing to the crime but was aware that his actions constituted a substantial contribution.[852] This contradicts all of the jurisprudence cited above from this

[845] Judgement Section VII, pp. 210-755.
[846] Judgement, para. 6905.
[847] Judgement, para. 6905.
[848] Judgement, para. 6947.
[849] Judgement, para. 6949.
[850] See, e.g., ICTR Statute, Art. 6(2); Rome Statute, Art. 27.
[851] Decision on Immunity from Jurisdiction, pp. 2, 26.
[852] Taylor Appeal, paras. 394-96.

Appeals Chamber, the ICTR, ICTY, ECCC and STL defining the *mens rea* for aiding and abetting. Taylor bases his argument on the premise that *mens rea* "always requires as a minimum that the accused know the character of the *actus reus*,"[853] but cites no authority for this assertion. There is no rule in international criminal law or state practice that an accused must always know before taking an action that all the elements of the *actus reus* will result. To take an example from common law, the *actus reus* for murder is the killing of a person but the *mens rea* is malice aforethought which is satisfied when it is shown the accused possessed the intent to kill *or* to cause grievous bodily harm.

320. Taylor argues that Article 30 of the ICC Statute articulates this principle,[854] but Article 30 merely provides that a person may be held criminally responsible "only if the material elements are committed with intent and knowledge." The Trial Chamber applied this standard, holding that "the lending of practical assistance, encouragement, or moral support must itself be *intentional*"[855] and that it must be shown that the accused performed the act with awareness of the substantial likelihood that the act would assist the commission of the underlying offence.[856]

(xi) Conclusion

321. The elements of *mens rea* for aiding and abetting are established by the jurisprudence of this Appeals Chamber and were correctly applied by the Trial Chamber in this case. There is no support in international criminal law jurisprudence for the elements proposed by Taylor – that the accused must act with something more than knowledge and must be certain of the future actions of the perpetrator. The standard proposed by Taylor would grant heads of states the prerogative to provide military assistance with the awareness of the substantial likelihood it will facilitate atrocity crimes against neighbours. Such a principle would be a very regrettable step backward in efforts to protect victims of atrocity crimes under international criminal law.

322. Contrary to Taylor's assertions, the Trial Chamber applied the correct standard of *mens rea* for aiding and abetting. Taylor's appeal under this Ground should be dismissed as it fails to demonstrate any error that would serve to invalidate the Judgement.

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[853] Taylor Appeal, para. 395.
[854] Taylor Appeal, para. 396.
[855] Judgement, para. 487 (emphasis added).
[856] Judgement, para. 486.

1325) SCSL-03-01-A (258 – 1214)

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR

IN THE APPEALS CHAMBER

Before: Justice Shireen Avis Fisher, Presiding
Justice Emmanuel Ayoola
Justice George Gelaga King
Justice Renate Winter
Justice Jon M. Kamanda
Justice Philip Nyamu Waki, Alternate Judge

Registrar: Ms. Binta Mansaray

Date filed: 1 October 2012

THE PROSECUTOR **Against** **CHARLES GHANKAY TAYLOR**
(Case No. SCSL-03-01-A)

PUBLIC PROSECUTION APPELLANT'S SUBMISSIONS

WITH CONFIDENTIAL SECTIONS D & E OF THE BOOK OF AUTHORITIES

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Mr. Mohamed A. Bangura
Ms. Nina Tavakoli
Ms. Ruth Mary Hackler
Ms. Ula Nathai-Lutchman
Mr. James Pace
Mr. Cóman Kenny
Ms. Leigh Lawrie
Mr. Christopher Santora
Ms. Kathryn Howarth

Counsel for Charles G. Taylor:
Mr. Morris Anyah
Mr. Eugene O'Sullivan
Mr. Christopher Gosnell
Ms. Kate Gibson
Ms. Magda Karagiannakis

47. To comply with Mr. Taylor's instruction, Bockarie and the AFRC/RUF commanders adopted a brutal strategy: to maintain control of Kono, they would make the area "fearful" to discourage civilians and the enemy from staying in or returning to Kono.[118] As a result, the AFRC/RUF forces inflicted a campaign of terror on the civilians in Kono District that became one of the bloodiest chapters in the Sierra Leone conflict.

48. The Judgement is replete with findings of the crimes perpetrated by AFRC/RUF forces after the Intervention in accordance with orders given by Bockarie and other AFRC/RUF commanders to make the area fearful and/or to keep civilians and the enemy away.[119] A reading of the findings and the evidence makes clear that such orders were given by the AFRC/RUF commanders to carry out Mr. Taylor's instruction to maintain control of Kono. For example, the findings establish that junta forces killed civilians at Hill Station,[120] Koidu Town (including 101 men at Igbaleh),[121] Bumpe[122] and Tombodu[123] to prevent civilians and ECOMOG from staying in or returning to the area. The findings also establish that AFRC/RUF perpetrators intentionally targeted civilians in Kono District by: burning homes, killing indiscriminately and amputating in Koidu Geiya;[124] hacking civilians to death in Koidu Buma;[125] burning houses, killing civilians and displaying dead bodies and human heads on sticks in Yengema;[126] killing civilians and looting property in Paema;[127] attacking civilians asleep in their homes, killing and

[118] Note that shortly after JPK recaptured Kono, he left for Kailahun district and Bockarie became the leader of the RUF/AFRC.
[119] *See, e.g.*, Judgement, paras. 646, 2008-2009, 2017.
[120] Judgement, paras. 652 (13 civilians shot by Superman), 658, 660, 663.
[121] Judgement, paras. 661, 670, 672, 2006. *See also* Judgement, paras. 1993, 1994, 1998.
[122] Judgement, paras. 682-684 (an unknown number of civilians were killed in accordance with orders given by Kallay, Bangura, Superman, Bockarie, Kallon, CO Rocky and others), 2017. *See also* Judgement, paras. 676, 677, 679, 681, 2008, 2014-16 detailing the burning of houses with civilians inside, amputations and putting heads on sticks.
[123] Judgement, paras. 686-687 (more than 20 civilians were massacred in March or April), 691-692 (Savage's forces, with the approval of Superman and Bomb Blast, killed about 63 civilians around April 1998), 697-698 (on Staff Alhaji's orders, 53 civilians were burned inside a building and 3 died from amputations), 703-704.
[124] Judgement, paras. 709-710.
[125] Judgement, paras. 712-713. *See also* Judgement, para. 711.
[126] Judgement, paras. 715-16.
[127] Judgement, paras. 729-730.

1285)

SCSL-03-01-T
(43136 - 43195)

[redacted]

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before:	Justice Richard Lussick, Presiding Judge Justice Teresa Doherty Justice Julia Sebutinde	
Registrar:	Binta Mansaray	
Date:	30 May 2012	
Case No.:	SCSL-03-01-T	
PROSECUTOR	v.	Charles Ghankay TAYLOR

SPECIAL COURT FOR SIERRA LEONE
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THE HAGUE
30 MAY 2012
NAME SAMUEL J. FORNAH
SIGN
TIME 15:45

SENTENCING JUDGEMENT

Office of the Prosecutor:

Brenda J. Hollis
Nicholas Koumjian
Mohamed Bangura
Kathryn Howarth
Leigh Lawrie
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Terry Munyard
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James Supuwood
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23

2.6. Aggravating Factors

95. The Prosecution argues that Mr. Taylor's "willing and enthusiastic participation" in the crimes constitutes an aggravating factor, citing his detailed knowledge of the crimes that were committed.[163] The Defence contends that to consider this an aggravating factor would amount to "double counting" elements of the offences for which Mr. Taylor was convicted.[164] The Trial Chamber agrees that Mr. Taylor's knowledge of the crimes is an element of his conviction and cannot be considered an aggravating factor.

96. The Prosecution argues that Mr. Taylor's leadership role, as President of Liberia and as a member of the ECOWAS Committee of Five, imbued him with inherent authority, which he abused to "fan the flames of conflict".[165] The Defence contends that this argument fails the pleading requirement and cites jurisprudence which the Trial Chamber has considered in its discussion of Applicable Law.[166] The Trial Chamber notes that the precedents cited state, more broadly than suggested by the Defence, that aggravating circumstances are "those circumstances directly related to the commission of the offence charged".[167] As the leadership role of Mr. Taylor during the Indictment period is directly related to the commission of the offences with which he was charged, the Trial Chamber has considered this role as an aggravating factor.

97. The Trial Chamber notes that as President of Liberia, Mr. Taylor held a position of public trust, with inherent authority, which he abused in aiding and abetting and planning the commission of the crimes for which he has been convicted. As a Head of State, and as a member of the ECOWAS Committee of Five and later the Committee of Six, Mr. Taylor was part of the process relied on by the international community to bring peace to Sierra Leone. But his actions undermined this process, and rather than promote peace, his role in supporting the military operations of the AFRC/RUF in various ways, including through the supply of arms and ammunition, prolonged the

[163] Prosecution Sentencing Brief, paras 79-81.

[164] Defence Sentencing Brief, para. 107.

[165] Prosecution Sentencing Brief, paras 83-84.

[166] See Applicable Law, *supra* para. 28.

conflict. The lives of many more innocent civilians in Sierra Leone were lost or destroyed as a direct result of his actions. As President and as Commander-in-Chief of the Armed Forces of Liberia, Mr. Taylor used his unique position, including his access to state machinery and public resources, to aid and abet the commission of crimes in Sierra Leone, rather than using his power to promote peace and stability in the sub-region. The Trial Chamber finds that Mr. Taylor's special status, and his responsibility at the highest level, is an aggravating factor of great weight. There is no relevant sentencing precedent for Heads of State who have been convicted of war crimes and crimes against humanity, but as Mr. Taylor himself told the Trial Chamber "I was President of Liberia. I was not some petty trader on the streets of Monrovia".[168]

98. The Trial Chamber notes that the actions of Mr. Taylor, then President of Liberia, caused and prolonged the harm and suffering inflicted on the people of Sierra Leone, a neighbouring country not his own. While Mr. Taylor never set foot in Sierra Leone, his heavy footprint is there, and the Trial Chamber considers the extraterritoriality of his criminal acts to be an aggravating factor.

99. The Trial Chamber found that there was a continuous supply by the AFRC/RUF of diamonds mined from areas in Sierra Leone to Mr. Taylor, often in exchange for arms and ammunition. Mr. Taylor repeatedly advised the AFRC/RUF to capture Kono, a diamondiferous area, and to hold Kono and to recapture Kono, so that they would have access to diamonds which they could use to obtain from and through him the arms and ammunition that were used in military operations to target civilians in a campaign of widespread terror and destruction. Mr. Taylor benefited from this terror and destruction through a steady supply of diamonds from Sierra Leone. His exploitation of the conflict for financial gain is, in the view of the Trial Chamber, an aggravating factor.

100. The Trial Chamber notes that although the law of Sierra Leone provides for the sentencing of an accessory to a crime on the same basis as a principal, the jurisprudence of this Court, as well as the ICTY and ICTR, holds that aiding and abetting as a mode of

[167] *Delalić* Appeal Judgement, para. 763; *Kunarac* Trial Judgement, para. 850.

[168] *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-T-1280, Statement of Dakhpannah Dr. Charles Ghankay Taylor, 18 May 2012, Annex A, para 36.

Case No. SCSL-2003-01-T

THE PROSECUTOR OF
THE SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

TUESDAY, 14 JULY 2009
9.30 A.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Justice Richard Lussick, Presiding Justice Teresa Doherty Justice Julia Sebutinde Justice El Hadji Malick Sow, Alternate
For Chambers:	Mr Simon Meisenberg Ms Doreen Kiggundu
For the Registry:	Mr Gregory Townsend Ms Advera Nsiima Kamuzora Ms Rachel Irura Mr Benedict Williams
For the Prosecution:	Mr Stephen Rapp Ms Brenda J Hollis Mr Mohamed A Bangura Mr Christopher Santora Ms Maja Dimitrova
For the accused Charles Ghankay Taylor:	Mr Courtenay Griffiths QC Mr Morris Anyah Mr Terry Munyard Mr James Supuwood Ms Salla Moilanen
For the Office of the Principal Defender:	Ms Claire Carlton-Hanciles

common enemy, happening to be ULIMO, we withdrew our men and ceased all, and I mean all, cooperation with the RUF.

Q. Did you thereafter provide any military assistance to the RUF?

09:45:55 A. None whatsoever.

Q. Were you thereafter aware of atrocities being committed in Sierra Leone?

A. Well, I put it this way: There is no one on this planet that would not have heard through international broadcasts or

09:46:29 probably discussions about what was going on in Sierra Leone. I would be the first to say yes, we did hear of certain actions that were going on in Sierra Leone that we - that were a little strange to us because those things did not occur in Liberia.

Q. What things?

09:46:51 A. Well, we heard that people were getting killed, women were getting raped and different things, and we couldn't understand it. I could not understand it, because these are things that we did not tolerate in Liberia and so for me it was unacceptable. But then again we had no way of verifying whether, you know,

09:47:17 these were true because we did not have anyone in there to tell us because, you know, these days when you see reports on television - I'm seeing on television this morning that I ordered people to cannibalise people in Sierra Leone, and when you begin to look at the different slants in the news, well, you hear them,

09:47:37 you cannot verify them, and it was not in my - it was not my duty to verify them, but I would say we did hear about those things in Sierra Leone.

Q. And had you ordered the RUF or any other group in Sierra Leone to carry out such actions?

I N D E X

ICTR Authorities

UNITED NATIONS
NATIONS UNIES

Tribunal pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Theodor Meron, Presiding** **Judge Mehmet Güney** **Judge Fausto Pocar** **Judge Andrésia Vaz** **Judge Carmel Agius**
Registrar:	**Mr. Adama Dieng**
Judgement of:	**20 October 2010**

CALLIXTE KALIMANZIRA

v.

THE PROSECUTOR

Case No. ICTR-05-88-A

JUDGEMENT

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Ms. Anta Guissé

The Office of the Prosecutor:

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Mr. Alphonse Van
Ms. Charity Kagwe-Ndungu
Mr. François-Xavier Nsanzuwera
Ms. Florida Kabasinga
Ms. Jane Mukangira

D. Alleged Errors Relating to the Inauguration of Élie Ndayambaye (Ground 5)

72. The Trial Chamber convicted Kalimanzira for aiding and abetting genocide, in part, based on his presence at the 22 June 1994 inauguration of Élie Ndayambaje as bourgmestre of Muganza Commune, Butare Prefecture, during which Ndayambaje instigated the killing of Tutsis.[194] The Trial Chamber found that, by his presence, Kalimanzira offered moral support to Ndayambaje's call to kill Tutsis during the ceremony and thereby aided and abetted subsequent killings.[195] In making these findings, the Trial Chamber relied on Witnesses BBB and BCA, who attended the ceremony, observed Kalimanzira's presence, and testified about subsequent killings.[196]

73. Kalimanzira submits that the Trial Chamber erred in convicting him in relation to this incident.[197] In this section, the Appeals Chamber will consider whether the Trial Chamber erred in the assessment of the evidence of the killings. In this respect, Kalimanzira contends that there is insufficient evidence demonstrating that killings in fact followed the ceremony.[198] The Prosecution responds generally that Kalimanzira's arguments lack merit, but does not address the sufficiency of the evidence relating to the killings.[199]

74. The Appeals Chamber recalls that "an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime."[200] The Appeals Chamber has explained that "[a]n accused can be convicted for aiding and abetting a crime when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime."[201] Where this form of aiding and abetting has been a basis of a conviction, "it has been the authority of the accused combined with his presence on (or very near to) the crime scene, especially if considered together with his prior conduct, which all together allow the conclusion that the accused's conduct amounts to official sanction of the crime and thus substantially contributes to it."[202]

75. In view of Kalimanzira's position as *directeur de cabinet* of the Ministry of Interior, it was reasonable for the Trial Chamber to determine that his silent presence during Ndayamabaje's

[194] Trial Judgement, paras. 291-293, 739.
[195] Trial Judgement, paras. 292, 293.
[196] Trial Judgement, para. 291.
[197] Kalimanzira Notice of Appeal, paras. 23-29; Kalimanzira Appeal Brief, paras. 92-161.
[198] Kalimanzira Appeal Brief, paras. 117-119, 135, 136.
[199] Prosecution Response Brief, paras. 75-90. *See also* T. 14 June 2010 pp. 32-37.
[200] *Muvunyi* Appeal Judgement, para. 79. *See also Seromba* Appeal Judgement, para. 44; *Blagojevi} and Joki}* Appeal Judgement, para. 127.
[201] *Br|anin* Appeal Judgement, para. 273. *See also Br|anin* Appeal Judgement, para. 277.

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron

Registrar: **Mr. Adama Dieng**

Judgement of: **2 February 2009**

FRANÇOIS KARERA

v.

THE PROSECUTOR

Case No. ICTR-01-74-A

JUDGEMENT

Counsel for the Appellant

Ms. Carmelle Marchessault
Mr. Alexandre Bergevin
Mr. Christian Deslauriers, Assistant

Office of the Prosecutor

Mr. Hassan Bubacar Jallow
Mr. Alex Obote-Odora
Ms. Dior Sow Fall
Mr. Abdoulaye Seye
Mr. François-Xavier Nsanzuwera
Mr. Alfred Orono Orono
Ms. Florida Kabasinga
Ms. Béatrice Chapaux

32

the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[727]

318. Contrary to the Appellant's contention, the specific identification of the perpetrators, who were identified in the Trial Judgement as *Interahamwe*, was not required for a finding that the Appellant instigated the killing of Gakuru. In any event, the Trial Chamber did identify the perpetrators. It is implicit, but certain, in the Trial Judgement that the Trial Chamber found that Gakuru was killed by the *Interahamwe* who were informed by the Appellant that Gakuru was an "*Inyenzi*" and who received his order to arrest him. The Trial Chamber found that "[b]y doing so, Karera left him [Gakuru] in the hands of *Interahamwe*" and that "[u]nder the prevailing circumstances, he must have understood that Gakuru would be killed".[728] That the Trial Chamber made such a finding is implicit in its recollection of the evidence of Witnesses BMO and BMN.[729] While it would have been preferable for the Trial Chamber to explicitly state that it identified the perpetrators of Gakuru's murder as being the *Interahamwe* to whom the Appellant indicated that Gakuru was an "*Inyenzi*" and who received the order to arrest him, this omission does not amount to an error.

319. However, based on the Trial Chamber's factual findings, the Trial Chamber could not have reasonably concluded that the Appellant prompted the perpetrators to kill Gakuru. The Trial Chamber made no factual findings supporting such a conclusion. It merely concluded that the Appellant had informed the *Interahamwe* who later killed Gakuru that he was an "*Inyenzi*" and ordered them to arrest him. The Trial Chamber should have further explained how, on the basis of these factual findings, it inferred that the Appellant had prompted the *Interahamwe* to kill Gakuru. In the absence of such an explanation, the Appeals Chamber finds that the Trial Chamber erred in convicting the Appellant for instigating Gakuru's murder.

320. The Appeals Chamber now turns to the Appellant's submission that the Trial Chamber erred in entering a conviction for aiding and abetting murder as a crime against humanity.

321. The *actus reus* of aiding and abetting is constituted by acts or omissions that assist, further, or lend moral support to the perpetration of a specific crime, and which substantially contribute to the perpetration of the crime.[730] The *mens rea* for aiding and abetting is knowledge that acts

[727] *Nahimana et al.* Appeal Judgement, para. 480; *Gacumbitsi* Appeal Judgement, para. 129; *Kordić and Čerkez* Appeal Judgement, para. 27.
[728] Trial Judgement, para. 456.
[729] *See* Trial Judgement, paras. 445, 447.
[730] *Nahimana et al.* Appeal Judgement, para. 482.

performed by the aider and abettor assist in the commission of the crime by the principal.[731] It is well established that it is not necessary for an accused to know the precise crime which was intended and which in the event was committed, but he must be aware of its essential elements.[732] If an accused is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime.[733]

322. The Trial Chamber found that the Appellant told the *Interahamwe* that Gakuru was an "*Inyenzi*" and that he ordered his arrest by the *Interahamwe*, which he must have understood would result in his murder.[734] On the basis of these findings, it was reasonable for the Trial Chamber to conclude that the Appellant aided and abetted the murder of Gakuru.[735] By instructing the *Interahamwe* to arrest Gakuru and telling them that Gakuru was an "*Inyenzi*", it was reasonable to conclude that the Appellant substantially contributed to the commission of his murder through specifically assisting and providing moral support to the principal perpetrators. Furthermore, in light of the evidence adduced, the Appeals Chamber finds no error in the Trial Chamber's finding that the Appellant had the requisite *mens rea*.

323. For the foregoing reasons, the Appeals Chamber grants this sub-ground of appeal in part and reverses the Appellant's conviction for instigating murder as a crime against humanity based on this event. The Appellant's conviction for aiding and abetting murder as a crime against humanity based on the killing of Gakuru is upheld.

F. Conclusion

324. The Appeals Chamber grants the Appellant's First Ground of Appeal and reverses the Appellant's conviction for aiding and abetting genocide and extermination as a crime against humanity, based on the alleged weapons distribution in Rushashi commune.

325. The Appeals Chamber further grants the Seventh Ground of Appeal, in part, and reverses the Appellant's conviction for instigating murder as a crime against humanity based on the killing of Gakuru.

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[731] *Nahimana et al.* Appeal Judgement, para. 482.
[732] *Nahimana et al.* Appeal Judgement, para. 482.
[733] *See Stakić* Appeal Judgement, para. 50; *Nahimana et al.* Appeal Judgement, para. 482.
[734] Trial Judgement, para. 456.
[735] Trial Judgement, para. 560.

UNITED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Wolfgang Schomburg

Registrar: **Mr. Adama Dieng**

Judgement of: **21 May 2007**

MIKAELI MUHIMANA

v.

THE PROSECUTOR

Case No. ICTR-95-1B-A

JUDGEMENT

Counsel for Mikaeli Muhimana:

Prof. Nyabirungu mwene Songa
Mr. Kazadi Kabimba
Mr. Mathias Sahinkuye

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. James Stewart
Ms. Linda Bianchi
Mr. Abdoulaye Seye
Mr. François Xavier Nsanzuwera

35

subordinate relationship between him and Mugonero.[430] He submits that the Trial Chamber was required to establish his position of authority in order to show that he used his authority to "persuade or force another person to commit a crime."[431]

189. The Appeals Chamber has explained that an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a specific crime, and that this support has a substantial effect on the perpetration of the crime.[432] The requisite mental element of aiding and abetting is knowledge that the acts assist the commission of the specific crime of the principal perpetrator.[433] For an accused to be convicted of abetting an offence, it is not necessary to prove that he had authority over the principal perpetrator.[434]

190. The Appeals Chamber is not convinced that the Trial Chamber erred in convicting the Appellant for abetting the rape of Witness BG when he gave permission to Mugonero to "take away" Witness BG. The Trial Chamber concluded that the Appellant was a well-known and influential person in his community.[435] The Trial Chamber further found that the Appellant knew that Mugonero wanted to rape the witness.[436] The Appeals Chamber considers that a reasonable trier of fact could find that the Appellant's actions in such circumstances amounted to encouragement which had a substantial affect on Mugonero's subsequent rape of Witness BG. In the *Semanza* Appeal Judgement, the Appeals Chamber reached a similar conclusion in respect of an "influential" accused who encouraged the rape of Tutsi women by giving "permission" to rape them.[437]

191. Accordingly, this sub-ground of appeal is dismissed.

E. Conclusion

192. In view of the foregoing, this ground of appeal is dismissed in its entirety.

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[430] Appellant's Brief, paras. 275, 285-290.
[431] Appellant's Brief, paras. 285, 290.
[432] *Ntakirutimana* Appeal Judgement, para. 530; *Vasiljević* Appeal Judgement, para. 102.
[433] *Ntakirutimana* Appeal Judgement, para. 530; *Vasiljević* Appeal Judgement, para. 102.
[434] *Cf. Semanza* Appeal Judgement, para. 257 (referring to instigation).
[435] Trial Judgement, para. 604.
[436] Trial Judgement, para. 323.
[437] *Semanza* Appeal Judgement, paras. 256, 257, quoting *Semanza* Trial Judgement, para. 478.

UNITED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Adama Dieng

Judgement of: 29 August 2008

THARCISSE MUVUNYI

v.

THE PROSECUTOR

Case No. ICTR-2000-55A-A

JUDGEMENT

Counsel for Tharcisse Muvunyi:

Mr. William E. Taylor III
Ms. Abbe Jolles
Mr. Dorian Cotlar

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. Alex Obote Odora
Mr. Neville Weston
Ms. Linda Bianchi
Ms. Renifa Madenga
Mr. François Nsanzuwera
Ms. Evelyn Kamau

37

analysis the evidence of Witness MO38 in favour of Witness TQ who had been accused of genocide.[162]

78. The Prosecution responds that the Trial Chamber correctly inferred that Muvunyi tacitly approved of the participation of ESO Camp soldiers in the attack at the *Groupe scolaire* from the order given to save the Bicunda family, his attempts to save a child of this family who was mistakenly taken, his refusal to come to the assistance of the other refugees, and his overall conduct in allowing a contingent of armed soldiers to leave the camp to participate in the attack.[163] The Prosecution contends that Muvunyi has not demonstrated that it was unreasonable to rely on the evidence of Witness TQ.[164] The Prosecution also notes that the Trial Chamber's conclusion that Muvunyi knew about the attack is reasonable in light of the proximity of the camp to the *Groupe scolaire* and the repeated nature of the attacks.[165]

79. The Appeals Chamber has explained that an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime.[166] The requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator.[167]

80. An accused may be convicted of aiding and abetting when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime.[168] In cases where tacit approval or encouragement has been found to be the basis for criminal responsibility, it has been the authority of the accused combined with his presence at or very near the crime scene, especially if considered together with his prior conduct, which allows the conclusion that the accused's conduct amounted to official sanction of the crime and thus substantially contributed to it.[169] The question of whether a given act constitutes substantial assistance to a crime requires a fact-based inquiry.[170]

81. The Trial Chamber refers only to limited circumstantial evidence suggesting that Muvunyi tacitly approved the criminal conduct of the principal perpetrators. It is well established that, as a

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[162] Muvunyi Appeal Brief, para. 63.
[163] Prosecution Response Brief, para. 142.
[164] Prosecution Response Brief, paras. 143, 144.
[165] Prosecution Response Brief, para. 149.
[166] *Blagojević and Jokić* Appeal Judgement, para. 127; *Ntagerura et al.* Appeal Judgement, para. 370.
[167] *Blagojević and Jokić* Appeal Judgement, para. 127; *Ntagerura et al.* Appeal Judgement, para. 370.
[168] *Brđanin* Appeal Judgement, paras. 273, 277.
[169] *Brđanin* Appeal Judgement, para. 277
[170] *Blagojević and Jokić* Appeal Judgement, para. 134.

UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: Adama Dieng

Judgement of: 28 November 2007

Ferdinand NAHIMANA
Jean-Bosco BARAYAGWIZA
Hassan NGEZE
(Appellants)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-99-52-A

JUDGEMENT

Counsel for Ferdinand Nahimana
Jean-Marie Biju-Duval
Diana Ellis

Counsel for Jean-Bosco Barayagwiza
Donald Herbert
Tanoo Mylvaganam

Counsel for Hassan Ngeze
Bharat B. Chadha
Dev Nath Kapoor

The Office of the Prosecutor
Hassan Bubacar Jallow
James Stewart
Neville Weston
George Mugwanya
Abdoulaye Seye
Linda Bianchi
Alfred Orono Orono

39

Translation certified by LSS, ICTR

order, and if that crime is effectively committed subsequently by the person who received the order.[1164]

482. The *actus reus* of aiding and abetting[1165] is constituted by acts or omissions[1166] aimed specifically at assisting, furthering or lending moral support to the perpetration of a specific crime, and which substantially contributed to the perpetration of the crime.[1167] Contrary to the three modes of responsibility discussed above (which require that the conduct of the accused precede the perpetration of the crime itself), the *actus reus* of aiding and abetting may occur before, during or after the principal crime.[1168] The *mens rea* for aiding and abetting is knowledge that acts performed by the aider and abettor assist in the commission of the crime by the principal.[1169] It is not necessary for the accused to know the precise crime which was intended and which in the event was committed,[1170] but he must be aware of its essential elements.[1171]

483. The Appeals Chamber concludes by recalling that the modes of responsibility under Article 6(1) of the Statute are not mutually exclusive and that it is possible to charge more than one mode in relation to a crime if this is necessary in order to reflect the totality of the accused's conduct.[1172]

B. Responsibility under Article 6(3) of the Statute

484. The Appeals Chamber recalls that, for the liability of an accused to be established under Article 6(3) of the Statute, the Prosecutor has to show that: (1) a crime over which the Tribunal has jurisdiction was committed; (2) the accused was a *de jure* or *de facto* superior of the perpetrator of the crime and had effective control over this subordinate (*i.e.*, he had the material ability to prevent or punish commission of the crime by his subordinate); (3) the accused knew or had reason to know that the crime was going to be committed or had been

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[1164] *Galić* Appeal Judgement, paras. 152 and 157; *Kordić and Čerkez* Appeal Judgement, para. 30; *Blaškić* Appeal Judgement, para. 42.

[1165] The French version of some Appeal and Trial Judgements of this Tribunal and of the ICTY mention the term "*complicité*" ("complicity") rather than "*aide et encouragement*" ("aiding and abetting"). The Appeals Chamber prefers "*aide et encouragement*" because these terms are the ones used in Article 6(1) of the Statute. Furthermore, the Statute uses the word "*complicité*" in a very specific context (see Article 2(3)(e) of the Statute); it should thus be reserved for that context.

[1166] *Ntagerura et al.* Appeal Judgement, para. 370; *Blaškić* Appeal Judgement, para. 47.

[1167] *Blagojević and Jokić* Appeal Judgement, para. 127; *Ndindabahizi* Appeal Judgement, para. 117; *Simić* Appeal Judgement, para. 85; *Ntagerura et al.* Appeal Judgement, para. 370 and footnote 740; *Blaškić* Appeal Judgement, paras. 45 and 48; *Vasiljević* Appeal Judgement, para. 102.

[1168] *Blagojević and Jokić* Appeal Judgement, para. 127; *Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, para. 48. See also *Čelebići* Appeal Judgement, para. 352, citing with approval the conclusion of the Trial Chamber in that case that it is not necessary that the assistance in question be given at the time of the commission of the crime.

[1169] *Blagojević and Jokić* Appeal Judgement, para. 127; *Brđanin* Appeal Judgement, para. 484; *Simić* Appeal Judgement, para. 86; *Ntagerura et al.* Appeal Judgement, para. 370; *Blaškić* Appeal Judgement, paras. 45 and 49; *Vasiljević* Appeal Judgement, para. 102; *Aleksovski* Appeal Judgement, para. 162.

[1170] *Simić* Appeal Judgement, para. 86; *Blaškić* Appeal Judgement, para. 50.

[1171] *Brđanin* Appeal Judgement, para. 484; *Simić* Appeal Judgement, para. 86; *Blaškić* Appeal Judgement, para. 50; *Aleksovski* Appeal Judgement, para. 162.

[1172] *Ndindabahizi* Appeal Judgement, para. 122; *Kamuhanda* Appeal Judgement, para. 77.

40

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

APPEALS CHAMBER

Case No. ICTR-99-46-A

ENGLISH
Original: FRENCH

Before: Judge Fausto Pocar, presiding
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Adama Dieng

Date: 7 July 2006

THE PROSECUTOR
(Appellant and Respondent)

v.

ANDRÉ NTAGERURA
(Respondent)
EMMANUEL BAGAMBIKI
(Respondent)
SAMUEL IMANISHIMWE
(Appellant and Respondent)

JUDGEMENT

Office of the Prosecutor
Hassan Bubacar Jallow
James Stewart

Counsel for André Ntagerura
Benoît Henry
Hamuli Rety

Counsel for Emmanuel Bagambiki
Vincent Lurquin

Counsel for Samuel Imanishimwe
Marie Louise Mbida
Jean-Pierre Fofé

41

them to do so".[735] The Prosecution submits that the *actus reus* of aiding and abetting in this instance is established by Imanishimwe's omission to prevent his soldiers from going to Gashirabwoba, and that this omission had a decisive effect on their ability to participate in the attack.[736] It further contends that Imanishimwe possessed the requisite knowledge to be an aider and abettor in the Gashirabwoba massacre,[737] given that the Trial Chamber found that he knew or should have known about the participation of his soldiers in the attack.[738]

368. The Appeals Chamber notes that the Trial Chamber did not expressly rule on the issue as to whether Imanishimwe could have incurred criminal responsibility for aiding and abetting the crimes committed at the Gashirabwoba football field on 12 April 1994. This notwithstanding, the Appeals Chamber does not conclude that the Trial Chamber failed to consider this form of responsibility. It indeed transpires from the legal findings made by the Trial Chamber that this form of responsibility was considered and even accepted when the facts lent themselves to it. The Appeals Chamber understands the Trial Chamber's silence with respect to aiding and abetting as an indication that it was not established that the Accued's conduct could in this particular instance be characterized as aiding and abetting.[739]

369. Accordingly, the issue is for the Appeals Chamber to inquire into whether this finding is one which a reasonable trier of fact could have made.

370. To establish the material element (or *actus reus*) of aiding and abetting under Article 6(1) of the Statute, it must be proven that the aider and abettor committed acts specifically aimed at assisting, encouraging, lending moral support[740] for the perpetration of a specific crime, and that the said support had a substantial effect on the perpetration of the crime. The Appeals Chamber adds that the *actus reus* of aiding and abetting may, in certain circumstances, be perpetrated through an omission.[741] The requisite *mens rea* is the fact that the aider and abettor knows that his acts assist in the commission of the specific crime of the principal.[742]

371. In the instant case, the Trial Chamber considered that it was not established that the Accused had ordered or was present during the attack launched at Gashirabwoba on 12 April 1994.[743] On the other hand, it found that the soldiers responsible for the attack could not have

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[735] *Ibid.*, para. 407.

[736] *Ibid.*, para. 408. In support of its line of reasoning, the Prosecution cites the *Blaškić* Trial Judgement, para. 284: "the *actus reus* of aiding and abetting may be perpetrated through an omission, provided this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite *mens rea*." (footnote omitted).

[737] Prosecution Appeal Brief, paras. 409-410, referring to *Tadić* Appeal Judgement, para. 229 and *Krstić* Appeal Judgement, para. 140.

[738] *Ibid.*, para. 410, citing Trial Judgement, para. 654.

[739] See *supra*, para. 359.

[740] The Appeals Chamber notes that the phrase "assist, encourage or lend no support" originally used by the Appeals Chamber in the *Tadić* (para. 229), *Aleksovski* (para. 163), *Vasiljević* (para. 102) and *Blaškić* (para. 45) Appeal Judgements has been translated as "*aider, encourager ou fournir un soutien moral*" in the French versions of the said Judgements. The Appeals Chamber considers that this translation may mislead the reader, given that "aided and abetted" is rendered in the French text of the Statute by "*aidé et encourage*".

[741] See *Blaskić* Appeal Judgement, para. 47.

[742] *Vasiljević* Appeal Judgement, para. 102; *Blaskić* Appeal Judgement, para. 45; *Kvočka et al.* Appeal Judgement, paras. 89-90, 188.

[743] Trial Judgement, paras. 439 and 653.

42

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Theodor MERON, Presiding** **Judge Florence MUMBA** **Judge Mehmet GÜNEY** **Judge Wolfgang SCHOMBURG** **Judge Inés Mónica WEINBERG DE ROCA**
Registrar:	**Mr. Adama Dieng**
Date:	**13 December 2004**

THE PROSECUTOR

v.

ELIZAPHAN NTAKIRUTIMANA AND GÉRARD NTAKIRUTIMANA

Cases Nos. ICTR-96-10-A and ICTR-96-17-A

JUDGEMENT

Counsel for the Prosecution

Mr. James Stewart
Ms. Linda Bianchi
Ms. Michelle Jarvis
Mr. Mathias Marcussen

Counsel for the Defence

Mr. David Jacobs
Mr. David Paciocco
Mr. Ramsey Clark

43

530. The *actus reus* for aiding and abetting the crime of extermination is that the accused carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of that crime. This support must have a substantial effect upon the perpetration of the crime. The requisite *mens rea* is knowledge that the acts performed by the aider and abettor assist the commission of the crime of extermination committed by the principal. If it is established that the accused provided a weapon to one principal, knowing that the principal will use that weapon to take part with others in a mass killing, as part of a widespread and systematic attack against the civilian population, and if the mass killing in question occurs, the fact that the weapon procured by the accused "only" killed a limited number of persons is irrelevant to determining the accused's responsibility as an aider and abettor of the crime of extermination.

531. The Appeals Chamber will next determine whether the above error invalidates the verdict. As already stated, the Appeals Chamber has quashed a number of the Trial Chamber's factual findings for lack of notice.[908] Accordingly, the Appeals Chamber must determine whether the remaining factual findings are sufficient to support a finding of criminal responsibility of the Accused for the crime of extermination.

532. With respect to Elizaphan Ntakirutimana, the remaining findings are: one day in May or June 1994, he transported armed attackers who were chasing Tutsi survivors at Murambi Hill,[909]; one day in the middle of May 1994, he brought armed attackers in the rear hold of his vehicle to Nyarutovu Hill, and the group was searching for Tutsi refugees and chasing them; on this occasion, Elizaphan Ntakirutimana pointed out the fleeing refugees to the attackers, who then chased these refugees singing, "Exterminate them; look for them everywhere; kill them; and get it over with, in all the forests";[910] one day on May or June 1994 Elizaphan Ntakirutimana was seen arriving at Ku Cyapa in a vehicle followed by two buses of attackers, and he was part of a convoy which included attackers;[911] and sometime between 17 April and early May 1994, Elizaphan Ntakirutimana was in Murambi within the area of Bisesero, and he went to a church in Murambi where many Tutsi were seeking refuge and ordered attackers to destroy the roof of the church.[912]

533. These findings are sufficient to sustain the Trial Chamber's finding of criminal responsibility on the part of Elizaphan Ntakirutimana for aiding and abetting the crime of genocide. The Appeals Chamber is satisfied that in carrying out these acts Elizaphan Ntakirutimana assisted,

[908] *Supra*, section II. A.1.(b).
[909] Trial Judgement, para. 579.
[910] *Id.*, para. 594.
[911] *Id.*, para. 661.
[912] *Id.*, para. 691.

44

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Carmel Agius, Presiding** **Judge Mehmet Güney** **Judge Liu Daqun** **Judge Arlette Ramaroson** **Judge Andrésia Vaz**
Registrar:	**Mr. Adama Dieng**
Judgement of:	**14 December 2011**

Dominique NTAWUKULILYAYO

v.

THE PROSECUTOR

Case No. ICTR-05-82-A

JUDGEMENT

Counsel for Dominique Ntawukulilyayo:

Maroufa Diabira
Dorothée Le Fraper du Hellen

Office of the Prosecutor:

Hassan Bubacar Jallow
James J. Arguin
Alphonse Van
Ousman Jammeh
Priyadarshini Narayanan
Deo Mbuto

45

his prior good conduct is inconsistent with any possible moral support or encouragement, and that his presence at Kabuye hill would therefore have been of no consequence to the assailants.[529]

212. The Prosecution responds that the elements of aiding and abetting were clearly established beyond reasonable doubt, and that prior good conduct is not a relevant factor.[530]

213. In reply, Ntawukulilyayo contends that, contrary to the Trial Chamber's finding, Kabuye hill was not an isolated area, and that its conclusion that the transfer of refugees provided a "tactical advantage" was therefore purely speculative.[531]

214. The Appeals Chamber recalls that the *actus reus* of aiding and abetting is constituted by acts or omissions specifically aimed at assisting, encouraging, or lending moral support to the perpetration of a specific crime, and which have a substantial effect upon the perpetration of the crime.[532] Whether a particular contribution qualifies as "substantial" is a "fact-based inquiry", and need not "serve as condition precedent for the commission of the crime."[533]

215. The Trial Chamber found beyond reasonable doubt that, in the early afternoon of Saturday, 23 April 1994, Ntawukulilyayo directed mostly Tutsi refugees at Gisagara market to go to Kabuye hill, promising them food and protection there, and that the refugees complied with his instructions.[534] The Trial Chamber further found that Ntawukulilyayo arrived at Kabuye hill later that day, and left shortly after dropping off soldiers who, along with others, subsequently attacked the civilian refugees at the hill.[535] As discussed above, the Appeals Chamber has found no error in the Trial Chamber's factual findings regarding Ntawukulilyayo's instructions to refugees at Gisagara market, and his arrival at Kabuye hill with soldiers.[536] Ntawukulilyayo has also failed to demonstrate error in the Trial Chamber's conclusion that the soldiers who accompanied him, along with others, attacked the refugees.[537] As regards the number of soldiers, the Appeals Chamber observes that the Trial Chamber did not rely on the specific number of soldiers who accompanied Ntawukulilyayo but on Ntawukulilyayo's contribution to the killings by bringing armed reinforcements.[538] Ntawukulilyayo's arguments that no reasonable trier of fact could determine with

[529] Appeal Brief, para. 252, *referring to ibid.*, paras. 190-202; Reply Brief, para. 103.
[530] Response Brief, paras. 192-206.
[531] Reply Brief, para. 100.
[532] *See, e.g., Karera* Appeal Judgement, para. 321; *Nahimana et al.* Appeal Judgement, para. 482.
[533] *Kalimanzira* Appeal Judgement, para. 86; *Rukundo* Appeal Judgement, para. 52; *Blagojević and Jokić* Appeal Judgement, para. 134.
[534] Trial Judgement, paras. 12, 263, 424, 453.
[535] Trial Judgement, paras. 18, 303, 453.
[536] *See supra*, Sections III, IV.
[537] *See supra*, para. 159.
[538] *See* Trial Judgement, para. 454.

UNITED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before:	**Judge Fausto Pocar, Presiding** **Judge Mehmet Güney** **Judge Liu Daqun** **Judge Theodor Meron** **Judge Carmel Agius**
Registrar:	**Mr. Adama Dieng**
Judgement of:	**20 October 2010**

EMMANUEL RUKUNDO

v.

THE PROSECUTOR

Case No. ICTR-2001-70-A

JUDGEMENT

Counsel for Emmanuel Rukundo:

Ms. Aïcha Condé
Mr. Benoît Henry

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Ms. Christine Graham
Mr. Abubacarr Tambadou
Mr. Ousman Jammeh
Mr. Shamus Mangan

47

other forms of responsibility pleaded in the Indictment. In the course of doing so, the Appeals Chamber will consider whether there was a sufficient nexus between Rukundo's acts, which he disputes under this ground of appeal, and the perpetration of the crimes as required by the relevant form of responsibility.

51. In determining Rukundo's role in the murder of Madame Rudahunga and the beating of the four others, the Trial Chamber noted that all four of the Prosecution witnesses who testified about this event connected him to the attacks.[107] It found that Rukundo was at the scene of the abduction and that he followed the vehicle carrying Madame Rudahunga and the soldiers who abducted her.[108] It further found that these same soldiers returned to Saint Joseph's College about 20 minutes later and abducted her children and two other Tutsi civilians.[109] Rukundo's car was also observed in the area of Madame Rudahunga's house after the killing and the beatings.[110] Furthermore, the Trial Chamber noted that Witness BLC attested to hearing him boast that "[w]e entered in Rudahunga's Inyenzi's house, we killed the wife and the children, but the idiot managed to get away",[111] while Witness CCH stated that Rukundo told her that Louis Rudahunga had to be killed.[112] The Appeals Chamber finds that it was reasonable for the Trial Chamber to conclude that this evidence was sufficient to support a finding that Rukundo was involved in the killing of Madame Rudahunga and the beatings of the four others.

52. The Appeals Chamber has explained that an "aider and abettor commits acts specifically aimed at assisting, encouraging, or lending moral support for the perpetration of a specific crime, and that this support had a substantial effect on the perpetration of the crime."[113] It recalls that there is no requirement of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime nor that such conduct served as a condition precedent to the commission of the crime.[114] It is sufficient for the aider and abettor's assistance or encouragement to have had a substantial effect on the realisation of that crime,[115] the establishment of which is a "fact-based

[106] *See supra* Section III.A (Ground 1: Alleged Error Relating to the Pleading of Commission).
[107] Trial Judgement, para. 165.
[108] Trial Judgement, paras. 165, 171.
[109] Trial Judgement, para. 171.
[110] Trial Judgement, para. 166.
[111] Trial Judgement, para. 167.
[112] Trial Judgement, para. 168.
[113] *Seromba* Appeal Judgement, para. 44. *See also Karera* Appeal Judgement, para. 321; *Mrkšić and Šljivančanin* Appeal Judgement, para. 81; *Blagojević and Jokić* Appeal Judgement, para. 127.
[114] *Mrkšić and Šljivančanin* Appeal Judgement, para. 81; *Blagojević and Jokić Appeal* Judgement, para. 134; *Blaškić* Appeal Judgment, para. 48.
[115] *Mrkšić and Šljivančanin* Appeal Judgement, para. 81; *Orić* Appeal Judgement, para. 43; *Nahimana et al.* Appeal Judgement, para. 482; *Blagojević and Jokić* Appeal Judgement, para. 134.

inquiry".[116] The Appeals Chamber is satisfied that the Trial Chamber's findings on Rukundo's role in the attacks, as set out above, demonstrate that his acts substantially contributed to the commission of the crimes.

53. With regard to the *mens rea* required for aiding and abetting, the Appeals Chamber has held that "[t]he requisite mental element [...] is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator."[117] Specific intent crimes such as genocide also require that "the aider and abettor must know of the principal perpetrator's specific intent."[118]

54. Bearing in mind the Trial Chamber's findings that these attacks formed part of a larger campaign of ethnic violence in the area and country,[119] the Appeals Chamber is convinced that the perpetrators acted with both genocidal intent and knowledge of the widespread and systematic attack against Tutsi civilians. In his consultation with the assailants prior to the crimes, his presence during the abduction of Madame Rudahunga, and his subsequent boasting of the killing, Rukundo would have been aware of his role in the crimes and the perpetrators' *mens rea*. Consequently, the Appeals Chamber finds that Rukundo's actions aided and abetted genocide and murder as a crime against humanity.

(c) *Chapeau* Elements of Crimes Against Humanity

55. Rukundo challenges his conviction for murder as a crime against humanity on the basis that Madame Rudahunga did not belong to a political group and it was not proven that he was aware of the existence of a widespread or systematic attack on a civilian population.[120]

56. Article 3 of the Statute requires that the crimes be committed "as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds." In the present case, the Trial Chamber found that the killing of Madame Rudahunga, a Tutsi, was part of a widespread and systematic attack against Tutsi civilians on ethnic grounds.[121]

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[116] *Blagojević and Jokić* Appeal Judgement, para. 134.
[117] *Muvunyi* Appeal Judgement, para. 79. *See also Karera* Appeal Judgement, para. 321; *Mrkšić and Ljivančanin* Appeal Judgement, para. 49.
[118] *Blagojević and Jokić* Appeal Judgement, para. 127; *Blagoje Simić* Appeal Judgement, para. 86.
[119] Trial Judgement, paras. 565-568, 581-582.
[120] Rukundo Appeal Brief, paras. 75, 76.
[121] Trial Judgement, paras. 581, 582. The Appeals Chamber also recalls that the individual victim's membership in a national, political, ethnic, racial or religious group is not required for a conviction for crimes against humanity, provided that all other necessary conditions are met, in particular that the act in question is part of a widespread or systematic attack against any civilian population. *See, e.g., Muhimana* Appeal Judgement, paras. 172-174 (upholding a conviction for the rape as a crime against humanity of two women whose ethnicity was unknown but which was found to be part of a widespread and systematic attack on ethnic grounds against Tutsis). *See also Mrkšić and Ljivančanin*

UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

IN THE APPEALS CHAMBER

Before: Judge Mohamed Shahabuddeen, Presiding
Judge Patrick Robinson
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Adama Dieng

Judgement of: 12 March 2008

THE PROSECUTOR

v.

ATHANASE SEROMBA

Case No. ICTR-2001-66-A

JUDGEMENT

Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Ms. Dior Fall
Ms. Amanda Reichman
Mr. Abdoulaye Seye
Mr. Alfred Orono Orono

Counsel for Athanase Seromba:

Mr. Patrice Monthé
Ms. Sarah Ngo Bihegué

50

bulldozer driver to demolish the church and stresses that he did not speak with him prior to the destruction of the church.[335]

138. The Prosecution responds that Athanase Seromba merely relies on his previous arguments regarding alleged erroneous factual findings and argues that he has failed to identify any error of law allegedly committed by the Trial Chamber.[336]

139. The Appeals Chamber recalls that the *actus reus* for aiding and abetting extermination as a crime against humanity comprises of acts specifically directed to assist, encourage, or lend moral support to the perpetration of this crime and that such support must have a substantial effect upon the perpetration of the crime.[337] In the present case, the Trial Chamber found that Athanase Seromba held discussions with the communal authorities and accepted their decision to destroy the church.[338] Moreover, the Trial Chamber found that Athanase Seromba encouraged the bulldozer driver to destroy the church and that he indicated its fragile side to the driver.[339] In support of this ground of appeal, Athanase Seromba refers to his arguments which challenged these factual findings.[340] The Appeals Chamber recalls its finding that it was not unreasonable for the Trial Chamber to rely on the testimonies of Witnesses CBJ, CBK, CDL, and CBR,[341] and that the Trial Chamber did not err in rejecting the testimony of Witness FE32 when making the impugned factual findings.[342] The Appeals Chamber has therefore already found that Athanase Seromba's challenge to the underlying factual findings is without merit.[343]

140. The Appeals Chamber considers that the finding of the Trial Chamber, which characterized Athanase Seromba's conduct as aiding and abetting the crime of extermination, is also subject to an appeal by the Prosecution and for practical reasons will be discussed there. Given that the Prosecution appeal on this point is granted, Athanase Seromba's arguments cannot succeed. Accordingly this sub-ground is dismissed.

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[335] Seromba's Appellant's Brief, para. 294.
[336] Prosecution's Respondent's Brief, paras. 187, 188.
[337] *Ntakirutimana* Appeal Judgement, para. 530.
[338] Trial Judgement, para. 364. The Appeals Chamber notes that the Trial Chamber used the words "approved" and "accepted" interchangeably to describe Athanase Seromba's conduct. *See* Trial Judgement, paras. 239, 268, 334, 264, 367, 382.
[339] Trial Judgement, para. 364. The Appeals Chamber notes that while the English translation of the Trial Judgement reads "Seromba even gave advice to the bulldozer driver concerning the fragile side of the church", the French text states that Seromba indicated (in the sense of providing information about) the fragile side of the church ("*Seromba a même donné des indications au conducteur du bulldozer sur le côté fragile de l'église*") (emphasis added). *See also* Trial Judgement, para. 269.
[340] Seromba's Appellant's Brief, para. 294.
[341] *See supra* Athanase Seromba's Ground of Appeal 7.
[342] *See supra* Athanase Seromba's Ground of Appeal 7.
[343] *See supra* Athanase Seromba's Ground of Appeal 7.

ICTY Authorities

UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-95-14/1-A
Date: 24 March 2000
Original: English

IN THE APPEALS CHAMBER

Before: **Judge Richard May, Presiding**
Judge Florence Ndepele Mwachande Mumba
Judge David Hunt
Judge Wang Tieya
Judge Patrick Robinson

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **24 March 2000**

PROSECUTOR

v.

ZLATKO ALEKSOVSKI

JUDGEMENT

Office of the Prosecutor:

Mr. Upawansa Yapa
Mr. William Fenrick
Mr. Norman Farrell

Counsel for the Appellant:

Mr. Srdjan Joka for Zlatko Aleksovski

> Corresponding to this is the care evinced by the Court not formally to overrule earlier decisions, but rather, where necessary, to try to explain away, usually on the ground of some factual particularity, an earlier decision which it feels unable to follow. The attitudes adopted in 1961 and 1964 in the *Temple of Preah Vihear* and the *Barcelona Traction* cases towards the 1959 decision in the Aerial Incident case are illustrative of this process, and of the relative character of the requirement of consistency of jurisprudence (which is probably the guiding element in this aspect of the Court's work) [245]

104. The right of appeal is a component of the fair trial requirement[246] set out in Article 14 of the ICCPR, and Article 21(4) of the Statute. The right to a fair trial is, of course, a requirement of customary international law.[247]

105. An aspect of the fair trial requirement is the right of an accused to have like cases treated alike, so that in general, the same cases will be treated in the same way and decided as Judge Tanaka said, "possibly by the same reasoning."[248]

106. The right to a fair trial requires and ensures the correction of errors made at trial. At the hearing of an appeal, the principle of fairness is the ultimate corrective of errors of law and fact, but it is also a continuing requirement in any appeal in which a previous decision of an appellate body is being considered.

107. The Appeals Chamber, therefore, concludes that a proper construction of the Statute, taking due account of its text and purpose, yields the conclusion that in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice.

108. Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been "wrongly decided, usually because the judge or judges were ill-informed about the applicable law."[249]

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[245] Rosenne, *The Law and Practice of the International Court* (1985), p. 613.
[246] Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (1993) comments that the bundle of rights which constitute the right to a fair trial are those set out in Articles 14 and 15 of the International Covenant on Civil and Political Rights 1966 (" CCPR") (*ibid.*, Article 14, para. 19).
[247] *See* Article 6 of the 1949 European Convention on Human Rights, Article 8 of the 1969 American Convention on Human Rights and Article 7 of the 1981 African Charter on Human and People's Rights.
[248] *See* footnote 243, Judge Tanaka's Separate Opinion.
[249] *Black's Law Dictionary* (7th ed., 1999).

54

109. It is necessary to stress that the normal rule is that previous decisions are to be followed, and departure from them is the exception. The Appeals Chamber will only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts.

110. What is followed in previous decisions is the legal principle (*ratio decidendi*), and the obligation to follow that principle only applies in similar cases, or substantially similar cases. This means less that the facts are similar or substantially similar, than that the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision. There is no obligation to follow previous decisions which may be distinguished for one reason or another from the case before the court.

111. Where, in a case before it, the Appeals Chamber is faced with previous decisions that are conflicting, it is obliged to determine which decision it will follow, or whether to depart from both decisions for cogent reasons in the interests of justice.

2. Whether the Decisions of the Appeals Chamber are Binding on Trial Chambers

112. Generally, in common law jurisdictions, decisions of a higher court are binding on lower courts. In civil law jurisdictions there is no doctrine of binding precedent. However, as a matter of practice, lower courts tend to follow decisions of higher courts. As one commentator has stated:

> ... it is hardly an exaggeration to say that the doctrine of *stare decisis* in the Common Law and the practice of Continental courts generally lead to the same results... In fact, when a judge can find in one or more decisions of a supreme court a rule which seems to him relevant for the decision in the case before him, he will follow those decisions and the rules they contain as much in Germany as in England or France.[250]

113. The Appeals Chamber considers that a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers for the following reasons:

(i) the Statute establishes a hierarchical structure in which the Appeals Chamber is given the function of settling definitively certain questions of law and fact arising from

55

2. Appellant's Response

160. The Appellant did not contest the argument of the Prosecution that, in the indictment, it had alleged his individual responsibility by aiding and abetting the mistreatment of the prisoners by the HVO soldiers outside the prison. He asserted, however, that it had not been proved that he had any connection with, or the possibility to control, the HVO soldiers (as their military commander or otherwise) or that he knew that they were going to mistreat the prisoners.[290] He also sought to argue that it had not been proved that the prisoners had been used as human shields, only that there had merely been an attempt to do so.[291] However, the finding by the Trial Chamber that the prisoners had been used as human shields was not challenged by him in his appeal.

3. Cross-Appellant's Reply

161. The Prosecution interpreted the Appellant's Response as asserting that, in the case of aiding and abetting, the *mens rea* of the accessory has to be the same as that of the principal.[292] The Appellant, however, has asserted no more than that the accessory must have known all the essential ingredients of the crime to be committed.[293] The Prosecution also denied that it was necessary for it to establish the Appellant had any connection with, or form of control over, the HVO soldiers who mistreated the prisoners when demonstrating his individual responsibility under Article 7(1) for their acts.

B. Discussion

162. The liability of a person charged with aiding and abetting another person in the commission of a crime was extensively considered by Trial Chamber II in the *Furundžija* Judgement.[294] It stated the following conclusions:[295]

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[288] *See* para. 168, *infra*.
[289] Cross-Appellant's Brief, para. 3.16; T. 45-49.
[290] Appellant's Response, pp. 23-24; T. 80-81.
[291] Appellant's Response, pp. 23-24.
[292] Cross-Appellant's Reply, para. 3.5.
[293] Appellant's Response, p. 23. Although incomplete, the statement by the Appellant was not inaccurate: *see* paras. 162-164, *infra*.
[294] *Furund'ija* Judgement, paras. 190-249.
[295] *Ibid.*, para. 249.

(i) It must be shown that the aider and abettor carried out acts which consisted of practical assistance, encouragement or moral support which had a substantial effect upon the commission by the principal of the crime for which the aider and abettor is sought to be made responsible.

(ii) It must be shown that the aider and abettor knew (in the sense of was aware) that his own acts assisted in the commission of that crime by the principal.

The Trial Chamber had earlier stated the conclusion that it is not necessary to show that the aider and abettor shared the *mens rea* of the principal, but it must be shown that the aider and abettor was aware of the relevant *mens rea* on the part of the principal.[296] It is clear that what must be shown is that the aider and abettor was aware of the essential elements of the crime which was ultimately committed by the principal.

163. Subsequently, in the *Tadic* Judgement, the Appeals Chamber briefly considered the liability of one person for the acts of another person where the first person has been charged with aiding and abetting that other person in the commission of a crime.[297] This was in the context of contrasting that liability with the liability of a person charged with acting pursuant to a common purpose or design with another person to commit a crime, and for that reason that judgement does not purport to be a complete statement of the liability of the person charged with aiding and abetting. It made the following points in relation to the aider and abettor:[298]

(i) The aider and abettor is always an accessory to the crime committed by the other person, the principal.

(ii) It must be shown that the aider and abettor carried out acts specifically directed to assist, encourage or lend moral support to the specific crime committed by the principal, and that this support has a substantial effect upon the commission of the crime.

(iii) It must be shown that the aider and abettor knew that his own acts assisted the commission of that specific crime by the principal.

(iv) It is not necessary to show the existence of a common concerted plan between the principal and the accessory.

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[296] *Ibid.*, para. 245.
[297] Judges Cassese and Mumba were members of the Trial Chamber in *Furundzija*, and of the Appeals Chamber in *Tadic*.
[298] *Tadic* Judgement, para. 229.

57

164. The Trial Chamber in the present case relied upon the *Furundžija* Judgement, amongst other decisions at first instance within the Tribunal (the *Tadi}* Judgement of the Appeals Chamber was given after the Trial Chamber had given its judgement).[299] The Trial Chamber expressed itself in various ways, but identified what it saw to be the two essential elements which had to be established in order to demonstrate liability for the acts of others, in these terms:

> The accused must have participated in the commission of the offence and "all acts of assistance by words or acts that end encouragement or support" constitute sufficient participation to entail responsibility according to Article 7(1) whenever the participation had [a] "substantial effect" on the commission of the crime. It is unnecessary to prove that a cause-effect relationship existed between participation and the commission of the crime. The act of participation need merely have significantly facilitated the perpetration of the crime. The accused must also have participated in the illegal act in full knowledge of what he was doing. This intent was defined by Trial Chamber II as "awareness of the act of participation coupled with a conscious decision to participate". If both elements are proved, the accused will be held responsible for all the natural consequences of the unlawful act.[300]

The absence of any reference to an awareness by the aider and abettor of the essential elements of the crime committed by the principal (including his relevant *mens rea*) detracts from that passage as a reasonably accurate statement of the law, but that flaw did not disadvantage the Appellant in the circumstances of this case, where the relevant state of mind on the part of the HVO soldiers was obvious from the nature of the injuries seen by him.

165. The Prosecution must, of course, establish the acts of the principal or principals for

[299] *Aleksovski* Judgement, para. 60.
[300] *Ibid*, para. 61. The citations of authority have been omitted.

58