CASE DIGESTS

Update on International Criminal Courts and Tribunals

MAY 2013

SUMMARIES of decisions related to international justice from the international criminal courts and tribunals from May 2012 to March 2013. Prepared by lawyers at the Open Society Justice Initiative to bring these decisions to the widest possible audience.

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International Criminal Court

Prosecutor v Ngudjolo Chui

Judgment pursuant to Article 74 of the Statute
ICC-01/04-02/12, 18 December 2012

Trial Chamber II at the ICC acquitted Mathieu Ngudjolo Chui of seven war crimes and three crimes against humanity in December 2012. The judges concluded that the prosecution had failed to prove beyond a reasonable doubt that Ngudjolo was the commander of a group of Lendu combatants (known at the *Front des Nationalistes et Integrationnistes*, (FNI)) from the Ituri region of the Democratic Republic of Congo. The judges based all of their findings on Ngudjolo's authority over the FNI. It did not make any findings about the crimes themselves.

The Chamber criticized the Prosecution for the conduct of its investigation and the presentation of insufficient evidence to prove the case beyond a reasonable doubt. The Chamber recognized the difficulties the Prosecution faced in gathering evidence in a war torn country, but it also considered that the Prosecution failed to carry out basic due diligence. In particular, the Chamber found the testimonies of the Prosecution's witnesses inconsistent and imprecise, and urged the Prosecution to conduct more careful analysis of their witnesses' background to strengthen their credibility. The Chamber also asked the Prosecution to provide a full picture of the community where the atrocities occurred, including the identification of the localities were the crime occurred, the role of the familial relationships and place of "sorcerers" in the Ituri community. The Chamber stressed that such evidence would allow them to qualify certain facts and assess the credibility of the witness. The Chamber's action in acquitting Mr. Ndudjolo sent a clear signal to the Prosecution that without proper evidence and meticulous investigations, the Court is unwilling to convict the accused without proper proof

Link to press release

Link to decision in French (PDF)

Prosecutor v Gbagbo

Appeal Judgment on Jurisdiction and Stay of Proceedings
ICC-02/11-01/11-312, 12 December 2012

Laurent Gbagbo had challenged the jurisdiction of the ICC to try him for crimes allegedly committed in the context of post-electoral violence between 16 December 2010 and 12 April 2011. At the time, Cote d'Ivoire was not a State Party to the ICC, but it had made a declaration accepting jurisdiction in April 2003. Mr. Gbagbo claimed that this was limited to giving the Court jurisdiction over crimes committed in 2002-2003. The Pre-Trial Chamber (PTC) rejected this argument, and the Appeals Chamber upheld the PTC's decision and rejected Mr. Gbagbo's appeal.

The Appeals Chamber confirmed that a declaration accepting the jurisdiction of the Court under Article 12(3) of the ICC Statute is not limited to specific events or a specific situation, unless the declaration makes that limitation. It may extend to cover crimes committed after the declaration, especially given the purpose of the Statute to deter future crimes. The Appeals Chamber also held that Cote d'Ivoire, as a non-State Party, did not have an automatic right to participate before the PTC under Article 19 (challenges to jurisdiction), although the PTC had the discretion to seek and

accept its views under Rule 103. Finally, the Appeals Chamber held that Mr. Gbagbo could not challenge the refusal to grant a stay of proceedings as part of this appeal as he failed to seek leave under Article 82(1)(d) of the Statute and such decisions cannot be appealed as of right (in contrast to decisions on jurisdiction per se, which can be appeal as of right under Article 82(1)(a)).

Link to press release

Link to decision (PDF)

Prosecutor v Kenyatta and *Prosecutor v Ruto*

Appeal Judgments on Jurisdiction arising out of Confirmation Decision
ICC-01/09-01/11-414 (Ruto) and ICC-01/09-02/11-425 (Kenyatta), 24 May 2012

The suspects in the two cases arising out of the 2007 post-election violence in Kenya challenged the jurisdiction of the Court to try them based on the element in "crimes against humanity" requiring a "State or organizational plan or policy" to commit the attack in question. As part of its decision confirming charges against four of the six suspects, the majority of the Pre-Trial Chamber (PTC) rejected this challenge, with Judge Kaul dissenting. The four remaining defendants appealed that decision, arguing that the PTC had misinterpreted this element of crimes against humanity and that it made factual errors in finding that there was such an organizational plan or policy, and that this meant that the Court did not have jurisdiction over them.

The Appeals Chamber rejected their appeals, holding that the interpretation of "organizational policy" and whether the evidence establishes such a policy is a question pertaining to the merits of the case rather than jurisdiction. Even if the Trial Chamber ultimately adopts a different interpretation of "organizational policy" or finds that the evidence does not establish that such a policy existed, it still has jurisdiction over the crimes with which the defendants were charged; it would just conclude that those crimes were not proven. The Appeals Chamber noted that other international criminal tribunals have similarly held that factual and evidentiary questions are not jurisdictional but are matters to assess at trial; and that even on questions of legal interpretation, only issues of whether a crime or mode of liability exists under customary international law is jurisdictional, whereas questions of the elements or definition of a crime or mode of liability are matters for the trial.

Link to press release

Link to decision (Kenyatta case, PDF)

Link to decision (Ruto case, PDF)

Prosecutor v Mbarushimana

Appeal Judgment on Prosecution Appeal against non-Confirmation of Charges
ICC-01/04-01/10-514, 30 May 2012

The Prosecution charged Mr. Mbarushimana with war crimes and crimes against humanity committed by the FDLR in the Kivu provinces of eastern Democratic Republic of the Congo. They alleged that he was responsible under Article 25(3)(d), which covers liability for other contributions to a group acting with a common purpose, as a result of his role as Executive Secretary of the FDLR and in particular his role in the groups international media campaign. The

Pre-Trial Chamber (PTC) refused to confirm charges, and the Prosecution appealed, arguing that the PTC had applied the wrong standard of proof when it sought to resolve inferences, credibility doubts and perceived inconsistencies in the Prosecution's evidence; and that it had applied the wrong standard in requiring "a significant contribution" for liability under Article 25(3)(d).

The Appeals Chamber rejected the Prosecution's appeal. Given that the ICC Statute gives a suspect the right to challenge the Prosecution's evidence and lead their own evidence at the confirmation hearing, the PTC must have some authority to evaluate ambiguities, inconsistencies or contradictions. Although the Prosecution does not need to lead all of their evidence at the confirmation hearing and may present summaries instead of calling witnesses, the PTC can request further evidence if necessary. In addition, Chambers have the ability to "freely assess all evidence … in order to determine its relevance or admissibility" (Rule 63(2)). Nevertheless, the PTC does not have the same function in evaluating evidence as the Trial Chamber, and given the limited evidence presented at the confirmation hearing the PTC should take great care before finding witnesses are or are not credible.

In relation to the PTC's requirement of "a significant contribution" for liability under Article 25(3)(d), the majority of the Appeals Chamber did not address this ground of appeal. The PTC had already found that there was no group acting with a common purpose – another of the elements required under Article 25(3)(d) – and the issue therefore did not materially affect the decision and any discussion by the Appeals Chamber would have been purely academic. Judge Fernandez de Gurmendi issued a separate opinion on this point, and would have held that the PTC erred in requiring that the contribution to the crimes be significant.

Link to press release

Link to decision (PDF)

Prosecutor v Lubanga

Decision on Sentence pursuant to Article 76 of the Statute
ICC-01/04-01/06-2901, 10 July 2012

Trial Chamber I's decision on sentencing in the *Lubanga* case is the ICC's first sentencing decision. As required by Article 78(3) of the Rome Statute, the Chamber pronounced a sentence for each crime, and a joint sentence specifying the total period of imprisonment, as follows:

- 13 years imprisonment for having committed, jointly with other persons, the crime of conscripting children under the age of 15 into the UPC;
- 12 years' imprisonment for having committed, jointly with other persons, the crime of enlisting children under the age of 15 into the UPC;
- 14 years' imprisonment for having committed, jointly with other persons, the crime of using children under the age of 15 to participate actively in hostilities; and
- A total period of 14 years' imprisonment – meaning that the sentences for each crime will run concurrently.

The time Lubanga had already served since his surrender to the ICC on 16 March 2006 was deducted from this sentence (leaving Lubanga with nearly eight years to serve).

The Chamber decided not to impose any fines, given Lubanga's indigence.

In determining Lubanga's sentence, the Chamber examined the gravity of the crimes. It held that conscripting and enlisting children under the age of fifteen and using them to participate actively in hostilities "are undoubtedly very serious crimes that affect the international community as a whole." It noted that the crime of conscription is distinguished by the added element of compulsion, and that using children to participate actively in hostilities involves exposing them to real danger as potential targets. It also noted that the vulnerability of children means that they need to be afforded particular protection that does not apply to the general population.

The Chamber also took into account the large-scale and widespread nature of the crimes committed, the degree of Lubanga's participation in the crimes and his intent to commit them (i.e. that he knew the crimes would occur in the ordinary course of events, and did not order them), as well as Lubanga's individual circumstances (e.g. age, education, etc.).

The Chamber determined that it would take aggravating factors into account, but required that they be proved "beyond a reasonable doubt" and that they not have been considered when assessing the gravity of the crimes. In the end, no aggravating factors met both of these requirements. The Chamber also examined mitigating circumstances, finding that they only needed to be proved by a balance of probabilities. In this respect, the Chamber took into account Lubanga's cooperation with the Court and respectful attitude throughout the proceedings.

Judge Elizabeth Odio Benito wrote a separate and dissenting opinion, finding that the Majority decision disregards the damage caused to the victims and their families, particularly as a result of the harsh punishments and sexual violence suffered by the victims of these crimes.

The Prosecution and Defence both appealed the sentencing order. The Appeals Chamber has not yet rendered a decision.

Link to press release

Link to decision (PDF)

Prosecutor v Lubanga

Decision establishing the principles and procedures to be applied to reparations
ICC-01/04-01/06-2904, 7 August 2012

Trial Chamber I's decision on reparations in the *Lubanga* case is the first reparations decision at the ICC. It sets out basic guidelines for distributing reparations, but does not specify what reparations will consistent of, exactly to whom to give them, or how. The Chamber gave primary responsibility for the reparations process to the Trust Fund for Victims (TFV), and ordered that it be supervised by a newly-constituted Trial Chamber I.

The decision's basic parameters state that victims are eligible for reparations if they can establish that they are the direct or indirect victim of harm that was proximately caused by Lubanga's enlistment, conscription and use of children under the age of 15 in Ituri in the Democratic Republic of Congo, from 1 September 2002 to 13 August 2003. Victims must establish this by a "balance of probabilities". Eligible victims include family members of direct victims, as well as those who intervened to help victims or to prevent the commission of these crimes, and also legal entities. Victims did not have to participate in the trial or apply for reparations to be eligible.

The Chamber found that individual and collective reparations may be appropriate, but expressed preference for collective reparations in this case. The Chamber also set out types of reparations

that may be appropriate and basic principles for each, including restitution, compensation, rehabilitation, publication of the decision, and measures that contribute to society's awareness of the crimes and improve the position of victims (e.g. campaigns and outreach programs). It is also open to Lubanga to volunteer an apology to the victims, on a public or confidential basis.

Given Lubanga's indigence, the Chamber decided that the TFV "shall complement the funding of a reparations award, albeit with the limitations of its available resources and without prejudice to its assistance mandate."

The TFV proposed, and the Chamber endorsed in its decision, a five-step plan for distributing reparations. First, the TFV, the Registry, the Office of Public Counsel for Victims (OPCV) and the team of experts would establish which locations ought to be involved in the reparations process, focusing particularly – but not exclusively – on the places referred to in the Judgment and where the crimes were committed. Second, there would be "a process of consultation in the localities that are identified." Third, the team of experts would, during this consultation phase, assess the harm suffered. Fourth, public debates should be held in each location to explain the reparations principles and procedures, and to address victims' expectations. Fifth and finally, proposals for collective reparations would be developed in each locality and then presented to the newly constituted Chamber for its approval.

The decision gave the new overseeing Chamber a modest role, receiving regular updates on the five-step implementation plan and resolving any contested issues that might arise. The Chamber would not otherwise issue any orders or instructions to the TFV.

The Chamber did not indicate how victims can participate in reparations proceedings, leaving it for the Registry to determine. As to the Prosecution and Defense, the Chamber did not develop their roles, though it noted that both were "parties to the reparations proceedings".

The Defense, the OPCV jointly with one of the legal representatives for victims, and the other legal representative for victims separately all appealed the reparations order. The Appeals Chamber suspended implementation of the reparations decision until these appeals are resolved. Given that the Appeals Chamber gave the parties and participants until April 2013 to file submissions, it is likely that the Appeals Chamber not will render a decision before the summer or fall of 2013.

Link to press release

Link to decision (PDF)

Prosecutor v Kenyatta and Prosecutor v Ruto

Decision Witnesses Preparation
ICC-01/09-02/11, 2 January 2013

Trial Chamber V at the ICC issued a decision allowing parties to "proof" witnesses prior to their testimony in court. In a protocol annexed to the decision, the judges set out what is and what is not acceptable practice. The protocol applies equally to the Prosecution and to the Defense. The chamber required that any such proofing must be video recorded for disclosure to the other parties in case there is any allegation of coaching. The judges reasoned this practice this will make in court testimony more accurate and efficient.

In response to defense arguments that proofing should not take the place of conducting investigations prior to trial, the judges determined that the purpose and nature of the witness preparation conducted by counsel shortly before the testimony of a witness differs in important respects from those activities that are properly undertaken during an investigation. During an investigation, the aim is to obtain evidence. The purpose of witness preparation is to enhance the efficacy of the proceedings. Furthermore, the judges determined that the prosecution's investigation should be concluded, in principle, before the final disclosure deadline in order to allow sufficient time for the defense to prepare for trial, or more preferably, before the start of the confirmation hearing. On the other hand, witness preparation, by its nature, is appropriately conducted shortly before a witness is due to testify.

Link to full text and Protocol (Ruto case, PDF)

Link to full text and Protocol (Kenyatta case, PDF)

Charges

The Prosecutor v. Katanga and Ngudjolo Chui

Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons
ICC-01/04-01/07-3319, 21 November 2012

The majority of Trial Chamber II proposed using Regulation 55 to change the legal characterization of the mode of liability to Germain Katanga. Prosecutors had charged Katanga and his former co-defendant, Mathieu Ngudjolo, with three counts of crimes against humanity and seven of war crimes as indirect co-perpetrators for an attack on a village in eastern DRC through the use of their respective militias to carry the crimes. This is a principal form of liability under Article 25(3)(a) of the Rome Statute that requires the accused to intend for each of the crimes to be committed. The majority considered changing Katanga's mode of liability to a lesser form of accessory liability under Article 25(3)(d)(ii) and charging him with complicity in the commission of a crime by a group of persons acting with a common purpose. Under this mode of liability, the accused does not have to intend for his actions to facilitate crimes but must be aware his contributions to the group will help commit the crime.

The majority explained that Katanga's rights would not be violated if the change is adopted because the facts that may be re-qualified have already been debated on the merits during the trial, so Katanga had the opportunity to defend himself. Specifically, the requirement under Article 25(3)(d) that the accused's contribution be "substantial or significant" is subsumed under the requirement for Article 25(3)(a) that the contribution be "essential" and lead to the realization of the objective elements of the crimes. The majority also found no violation of Katanga's right to have adequate time and facilities for the preparation of his defense, his right to be tried without undue delay, or right not to be compelled to testify against oneself.

The dissenting opinion strongly opposed the majority stating the change "goes well beyond any reasonable application of [Regulation 55] and fundamentally encroaches upon the accused's right to a fair trial." The judge also warned that the decision of the majority risks giving the perception of impartiality.

Significance: If the judges use Regulation 55 to change Katanga's mode of liability, it would change the nature of the charges against Katanga at a very late stage in the trial process. It brings into question fair trial rights for the defendant, and in the future, parties to cases may need to prepare for arguments on various modes of liability, even if they are not charged.

Link to full text (PDF)

The Prosecutor v. Bemba Gombo

Decision lifting the temporary suspension of the trial proceedings and addressing additional issues raised in defence submissions
ICC-01/05-01/08-2500, 6 February 2013

On 21 September 2012, Trial Chamber III issued a decision giving notice to the parties that the legal characterization of the facts may be subject to change in accordance with Regulation 55. Jean-Pierre Bemba is currently charged with command responsibility under Article 28(b)(i) for two counts of crimes against humanity and three counts of war crimes for allegedly failing to prevent Movement for the Liberation of Congo (MLC) troops under his command from committing crimes. Currently, the facts of the charges are that Bemba "knew that the MLC troops were committing crimes and did not take all necessary and reasonable measures with his power to prevent or repress their commission." The proposal of the Trial Chamber would not change the mode of liability, but it would shift to an alternate form of knowledge within Article 28(b)(i) – specifically, that "owing to the circumstances at the time, the accused 'should have known' that the forces under his effective command…were committing or about to commit the crimes" in the charges.

In response to a number of objections from the defense, on 13 December 2012 the chamber temporarily suspended proceedings for two and a half months citing the balance of the need to ensure adequate time and facilities to prepare with ensuring the trial is fair and expeditious for the defense. However, the defense claimed that because a formal decision under Regulation 55 has not been made, there is no lawful authority to prosecute Bemba under the alternate form of knowledge and requested the suspension be lifted. Following the Appeal Chamber jurisprudence in the Lubanga case, the chamber held that no formal decision is required under Regulation 55 and the chamber can modify the legal characterization of facts at any stage of trial. The chamber also approved the defense waiver of the opportunity to conduct further investigations and recall witnesses.

Significance: Similar to the Katanga case, the use of Regulation 55 comes very late into the trial process - two months after the defense began its presentation of evidence. It brings into question fair trial rights for the defendant and could force parties to cases to prepare for arguments on various modes of liability, even if they are not charged.

Link to full text (PDF)

Link to full text September 2012 Regulation 55(2) decision giving notice

Link to full text December 2012 temporary suspension of trial decision

Prosecutor v Kenyatta et al

Charges dropped against Muthaura
ICC-01/09-02/11, 18 March 2013

In March 2008, Pre-Trial Chamber II issued summonses to appear for Francis Kirimi Muthaura, together with Uhuru Muigai Kenyatta and Mohammed Hussein Ali, who were charged as co-accused in a case concerning the 2007-2008 post-election violence in Kenya. On 23 January 2012, Pre-Trial Chamber II confirmed charges against Kenyatta and Muthaura, but not against Ali. The case against Kenyatta and Muthaura was scheduled to go to trial in mid-2013.

On 11 March 2013, the Prosecution withdrew its charges against Muthaura on the grounds that "[h]aving considered the totality of the evidence," the Prosecution "has no reasonable prospect of conviction were it to proceed to trial against Mr Muthaura on the charges as confirmed." The Prosecution explained that the case had presented "serious investigative challenges", including a limited pool of potential witnesses – several of whom had been killed or died since the post-election violence, and others who are unwilling to testify or provide evidence to the Prosecution. The Prosecution also explained that, "[d]espite assurances of its willingness to cooperate with the Court," the Government of Kenya had only limitedly cooperated with the Prosecution, and had "failed to assist it" in obtaining evidence that "would have been crucial, or at the very least, mayhave been useful in the case against Mr Muthaura". Finally, the Prosecution explained that a critical witness against Muthaura had recanted a significant part of his incriminating evidence after the confirmation decision was issued, and admitted accepting bribes from persons allegedly holding themselves out as representatives of both accused. As such, the Prosecution would no longer rely on the witness' evidence.

On 18 March 2013, Trial Chamber V granted the Prosecution's decision to withdraw the charges, and terminated all proceedings in the case against Muthaura. The case against Kenyatta continues.

Link to Prosecution's withdrawal (PDF)

Link to Chamber's decision (PDF)

Arrest Warrants

Prosecutor v. Simone Gbagbo

Unsealing of Warrant against Mrs. Gbagbo
ICC-CPI-20121122-PR857, 22 November 2012

On 22 November 2012, the Pre-Trial Chamber I of the ICC unsealed the arrest warrant against Simone Gbagbo, the wife of Laurent Gbagbo, on four charges of crimes against humanity on her actions in Côte d'Ivoire in between 16 December 2010 and 12 April 2011. She is alleged to have participated in murder, sexual violence and other inhumane acts within the meaning of Article 25(3)(a) of the Rome Statute. Côte d'Ivoire is not a party to the Rome Statute, but accepted ICC jurisdiction on 18 April 2003. President Outarra reconfirmed ICC jurisdiction on 14 December 2010 and 3 May 2011, and the Prosecutor was authorized to open investigations proprio mutu over crimes committed since 28 November 2010. Pre-Trial Chamber III later decided to expand its authorization to included crimes allegedly committed between 19 September 2002 and 28 November 2010.

Link to press release

Prosecutor v. Sylvestre Mudacumura

Warrant issued against Mdacamura
ICC-PCI020120713-PR827, 13 July 2012

Pre-Trial Chamber II issued an arrest warrant for Sylvestre Mudacumura on 13 July 2012 to ensure that he will not obstruct court proceedings or continue committing crimes. He is suspected of committing war crimes in the Kivus conflict taking place in the Democratic Republic of Congo. Mudacumura is allegedly responsible for nine counts of war crimes that include attacking civilians, murder, mutilation, cruel treatment, rape, torture, destruction of property, pillaging and outrages against personal dignity. The Democratic Republic of Congo ratified the Rome Statute on 11 April 2002, and referred the Court to the situation on 3 March 2004.

Link to press release

Prosecutor v. Bosco Ntaganda

Second warrant issued against Ntaganda
ICC-CPI-20120713-PR828, 13 July 2012

Pre-Trial Chamber II issued a second arrest warrant for M23 leader Bosco Ntaganda, who is allegedly responsible for crimes against humanity consisting of rape, sexual slavery and persecution, and war crimes consisting of murder, attacks against civilians, rape, sexual slavery, and pillaging. The first warrant was issued on 22 August 2006 for three counts of war crimes in Ituri, Democratic Republic of Congo, for war crimes that include the enlisting, conscripting and using children under age 15 to actively participate in hostilities. The Prosecutor initiated an investigation n 21 June 2004. Ntganda surrendered himself to the ICC on 19 March 2013 in Rwanda, and pleaded not guilty to all charges on 26 March 2013.

Link to press release

Ratification of the protocol on Aggression

The crime of aggression was included in the Rome Statute in 1998, but its definition and implementation were deferred to a Review Conference. Amendments adopted in 2010 define the crime of aggression and set out the conditions for the exercise of jurisdiction over this crime. The Court may exercise jurisdiction over the crime of aggression once 30 States Parties have ratified the amendments, and subject to a decision to be taken after 1 January 2017 by the States Parties.

On 9 May 2012, Liechtenstein deposited its instrument of ratification of the amendments to the Rome Statute on the crime of aggression. It is the first State Party to ratify these amendments.

Link to press release

On 25 September 2012, Samoa deposited its instrument of ratification of the amendments to the Rome Statute on the crime of aggression. It is the second State Party to do so.

Link to press release

On 15 November 2012, Trinidad and Tobago deposited its instrument of ratification of the amendments to the Rome Statute on the crime of aggression. It is the third State Party to do so.

Link to press release

On 15 January 2013, Luxembourg deposited its instrument of ratification of the amendments to the Rome Statute on the crime of aggression. It is the fourth State Party to do so.

Link to press release

International Criminal Tribunal for the former Yugoslavia

Prosecutor v. Gotovina and Markac

ICTY Appeals Chamber, Case No. IT-06-90-A, Judgment of 16 November 2012

The ICTY Appeals Chamber, by a 3-2 majority, reversed the convictions of Generals Ante Gotovina and Mladen Markač for their role during the two-day Croatian offensive in August 1995 called Operation Storm in which the Croatian military took control over parts of a previously Serb-held area called Krajina. Gotovina was the overall operational commander of Operation Storm in the southern portion of the Krajina region. Markač was the Assistant Minister of the Interior and Operation Commander of the Special Police in Croatia. The Trial Chamber had unanimously found that they shared the objective of and significantly contributed to a joint criminal enterprise, whose common purpose was to permanently remove the Serb civilian population from the Krajina region, by ordering unlawful artillery attacks on four towns, by failing to make a serious effort to prevent or investigate the crimes committed by their subordinates against Serb civilians in the Krajina.

Gotovina's and Markač's liability principally related to a campaign of shelling carried out on four towns in Krajina. The Trial Chamber's finding that the shelling was unlawful was heavily premised on its analysis of individual impact sites ("Impact Analysis"). The Impact Analysis was in turn based on the Trial Chamber's finding of a 200 meter range of error for artillery projectiles, such that shellings within 200 meters of a legitimate target were considered presumptively lawful whereas those further than 200 meters of a legitimate target were considered evidence of an indiscriminate attack ("200 Meter Standard").

The Appeals Chamber unanimously held that this 200 Meter Standard was in error — that it was not supported by evidence and the Trial Chamber failed to provide adequate reasons. The majority of the Appeals Chamber then treated this error as the frayed thread that, once pulled, unravelled the entire judgment. Although the Trial Chamber relied on additional evidence as part of its finding that the shellings were indiscriminate, the majority of the Appeals Chamber considered the Impact Analysis essential to this conclusion, and reversed the finding that the shellings of the four towns were unlawful. Regarding the joint criminal enterprise (JCE), the majority considered that JCE's core common purpose of forcibly removing Serb civilians from the Krajina rested primarily on the existence of unlawful artillery attacks against civilians and civilian objects in the four towns, and it discounted the significance of the Trial Chamber's findings on the planning and aftermath of the artillery attacks. It therefore held that no reasonable trial chamber could have found that the only reasonable interpretation of the circumstantial evidence was the existence of a JCE with the common purpose of permanently removing the Serb population from the Krajina by force, and reversed Gotovina's and Markač's convictions.

Significance: The judgments is probably most significant for the effect it will have on the perception of the politics of the tribunal (where Serbs and Bosnian Serbs see it as targeting them unjustly), for the collective denial it allows Croatians with respect to crimes committed during Operation Storm (where the facts of the violence are already highly contested), and in legal circles for the majorities apparently lack of fidelity to common law appellate standards. Commentators

may also fault the Appeals Chamber's review of factual findings that the Trial Chamber made on the totality of the evidence, whereas the Appeals Chamber appeared to evaluate the sufficiency of each piece of evidence separately.

Link to summary

Link to Appeal Judgment (PDF)

Prosecutor v. Perišic

ICTY Appeals Chamber, Case No. IT-04-81-A, Judgment of 28 February 2013

The ICTY Appeals Chamber, by a 4 to 1 majority, reversed the Trial Chamber's convictions of General Momčilo Perišić, and entered an acquittal on all counts. In its judgment, the Appeals Chamber revisited the elements of the *actus reus* for aiding and abetting, finding that an aider or abettor must specifically direct his conduct to the crime committed by the perpetrator. This decision not only seeks to settle inconsistent and contradictory case law from the ICTY – it could also affect the jurisprudence of the Special Court for Sierra Leone (SCSL) and the appeal of the conviction of Charles Taylor.

Perišić was the Yugoslav Army's most senior officer, and a member of the high command of the Yugoslav People's Army. At trial, he was convicted of aiding and abetting crimes committed by the Bosnian Serb Army (Army of the Republika Srpska or "VRS") in Sarajevo and Srebrenica, Bosnia and Herzegovina, on the grounds that he facilitated the provision of military and logistical assistance from the Yugoslav People's Army to the VRS. He was also found criminally responsible for his failure to punish Yugoslav Army soldiers for crimes they committed in Zagreb, Croatia while they were seconded to the VRS. He was sentenced to 27 years in prison.

The Trial Chamber had found that the *actus reus* of aiding and abetting did not require proof that Perišić's conduct was specifically directed to assist, encourage or lend moral support to the perpetration of the crimes of the principal perpetrators. Instead, the Trial Chamber had held that the only requirement was that Perišić's conduct had a substantial effect on the crimes perpetrated by the VRS at Srebrenica and Sarajevo. The Trial Chamber relied on the Appeals Chamber's earlier judgment in *Prosecutor v. Mrkšić and Šljivančanin*, in which the Appeals Chamber expressly "confirmed that 'specific direction' is not an essential ingredient of the *actus reus* of aiding and abetting."

The Appeals Chamber held that this was incorrect. It went back to its original formulation of the *actus reus* of aiding and abetting from its decision in *Prosecutor v. Tadić*, which required that the accused's conduct be specifically directed at the perpetration of the principal perpetrators' crimes. The Appeals Chamber considered that where an accused aider and abettor is physically present at the crime scene, specific direction "will be self-evident", but where the putative aider and abettor's conduct is geographically, temporally, or otherwise remote from the crimes of the principal perpetrators explicit consideration of specific direction is required.

In support of the "specific direction" requirement, the Appeals Chamber examined 34 cases involving aiding and abetting liability decided at the ICTY and ICTR appeals chambers, and concluded that "no judgment of the Appeals Chamber has found cogent reasons to depart from" the *Tadić* formulation. It considered the contradictory judgment relied upon by the Trial Chamber, the *Mrkšić and Šljivančanin* judgment, distinguishable on the grounds that the contrary statement was made in the context of a discussion of the elements of the *mens rea* rather than *actus reus* of

aiding and abetting, which it therefore treated as dicta. The Appeals Chamber further reasoned that if it had intended to depart from settled law it would have provided a reasoned opinion for overturning precedent.

After finding legal error, the Appeals Chamber then conducted a de novo review of the evidence to determine whether Perišić's conduct was specifically directed to assist Bosnian Serb crimes in Sarajevo and Srebrenica. It found that the evidence at trial did not prove this beyond a reasonable doubt. Significantly, the Appeals Chamber considered that aid for the VRS war effort could be distinguished from aid for its criminal activities, and that it was reasonable to infer that Perišić's role in directing "large-scale military assistance to the general VRS war effort" was not specifically directed to the VRS's crimes.

Significance: This case is significant because Perišić had been the only Serbian military commander convicted by the ICTY for crimes committed by the VRS in Bosnia. It is also significant because the Appeals Chamber attempts to settle the law on the *actus reus* of aiding and abetting at ICTY. After Perišić, there is one remaining opportunity for the ICTY prosecutors to demonstrate Serbian state involvement in the crimes committed in Bosnia and Croatia. A verdict is pending in the trial of high-level Serbian state security service officials Jovica Stanišić and Franko Simatović.

The case is also significant to the appeal of the Charles Taylor Trial Judgment before the Special Court for Sierra Leone ("SCSL"). Taylor was convicted of 11 counts of aiding and abetting war crimes and crimes against humanity for his role in Sierra Leone's civil war. In setting out the elements of aiding and abetting, the SCSL Trial Chamber expressly held that the "actus reus of aiding and abetting does not require 'specific direction'." It cited the *Perišić* Trial Judgment, and referenced the *Mrkšić and Šljivančanin* Appeal Judgment. The two trial chambers at the SCSL appear to split on this issue, and the other trial chamber in the CDF and RUF cases that, relying on ICTY jurisprudence, had found that the accused must have "specifically directed [their conduct] to assist, encourage or lend moral support to the preparation of a certain specific crime." The *Perišić* Appeal Judgment – decided after the Taylor appeal was filed – will no doubt factor into the SCSL Appeals Chamber's assessment.

Link to summary (PDF)

Link to Appeal Judgment (PDF)

International Criminal Tribunal for Rwanda

Prosecutor v. Mugenzi and Mugiraneza,

ICTR Appeals Chamber, Case No. ICTR-99-50-A, Judgment of 4 February 2013 ("the Government II case")

The Appeals Chamber issued its judgment on 4 February 2013, reversing the convictions of two senior government ministers for their role in the Rwandan genocide. Mugenzi was the Minister of Trade and Industry and Mugiraneza was the Minister of Civil Service. At Trial, they were convicted of conspiracy to commit genocide based on their roles in the removal of Jean-Baptiste Habyalimana (a moderate Tutsi) from his post as the prefect of Butare Prefecture at a Cabinet meeting on 17 April 1994 (in Butare, exceptionally, there had been no massacres of Tutsis until Habyalimana's removal).

The Appeals Chamber noted that the Trail Chamber relied upon circumstantial evidence to find that Mugenzi and Mugiraneza participated in the removal of the prefect in order to further violence in Butare, and it rejected evidence and arguments regarding alternative explanations, including that the prefect was removed for administrative reasons. A 4-1 majority of the Appeals Chamber disagreed and considered that the considerations identified by the Trial Chamber did not eliminate the reasonable possibility that Mugenzi and Mugiraneza agreed to remove Habyalimana for political or administrative reasons rather than for the purpose of furthering the killing of Tutsis in Butare Prefecture. They therefore held that the Trial Chamber erred in finding Mugenzi and Mugiraneza possessed the requisite *mens rea* for conspiracy to commit genocide.

Mugenzi and Mugiraneza were also convicted for incitement to commit genocide based on their roles in the installation ceremony of Sylvain Nsabimana as the new prefect for Butare Prefecture on 19 April 1994. They were each sentenced to 30 years imprisonment.

The Appeals Chamber, however, found that the Trial Chamber lacked a sufficient evidentiary basis to conclude that Mugenzi and Mugiraneza were aware of what the content of President Sindikubwabo an inflammatory speech at the 19 April 1994 installation ceremony of the new prefect, calling for the massacre of Tutsis, by would be or the aim behind it. As a result, the Appeals Chamber reversed the Trial Chamber's findings as to Mugenzi's and Mugiraneza's *mens rea* in relation to their convictions for direct and public incitement to commit genocide, and acquitted them of those charges.

Significance: The significance of the case is several-fold. From the perspective of the tribunal's lack of efficiency and fairness to the accused, commentators will likely note that it was one of the ICTR's largest, spanning more than 12 years from the initial appearance to conviction, and almost five years during trial (171 witnesses on 399 trial days). Strikingly, the Trial Chamber labored for *three years* after the closing arguments before it issued the Trial Judgment. In addition to the two convicted persons who were acquitted on appeal, two co-accused were acquitted of all charges by the Trial Chamber. The accused were detained throughout the pre-trial and trial phases.

Legal commentators will also likely note the Appeals Chamber majority's seeming departure from appellate standards of review, particularly in its willingness to overturn findings of fact.

Link to Appeal Judgment (PDF)

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