Corporate Liability for International Criminal Law Violations

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Leading Cases

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Julia Graff, "Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo," *Human Rights Brief 11*, no. 2 (2004), pp. 23-26.

David Scheffer, "Corporate Liability under the Rome Statute," *Harvard International Law Journal,* Vol. 57, Online Symposium (Spring 2016), pp. 35-39

Shannon Raj Singh, "Move fast and break societies: the weaponisation of social media and options for accountability under international criminal law," *Cambridge International Law Journal*, Vol. 8 No. 2 (2019), pp. 331–342

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INTERNATIONAL MILITARY TRIBUNAL (NUREMBERG)

Judgment of 1 October 1946

Page numbers in braces refer to IMT, judgment of 1 October 1946, in *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22 (22nd August ,1946 to 1st October, 1946)

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THE INTERNATIONAL MILITARY TRIBUNAL IN SESSOIN AT NUREMBERG, GERMANY

Before:

THE RT. HON. SIR GEOFFREY LAWRENCE (member for the United Kingdom of Great Britain and Northern Ireland) President

THE HON. SIR WILLIAM NORMAN BIRKETT (alternate member for the United Kingdom of Great Britain and Northern Ireland)

MR. FRANCIS BIDDLE (member for the United States of America)

JUDGE JOHN J. PARKER (alternate member for the United States of America)

M. LE PROFESSEUR DONNEDIEU DE VABRES (member for the French Republic)

M. LE CONSEILER FLACO (alternate member for the French Republic)

MAJOR-GENERAL I. T. NIKITCHENKO (member for the Union of Soviet Socialist Republics)

LT.-COLONEL A. F. VOLCHKOV (alternate member for the Union of Soviet Socialist Republics)

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THE UNITED STATES OF AMERICA, THE FRENCH REPUBLIC, THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, AND THE UNION OF SOVIET SOCIALIST REPUBLICS

Against:

Hermann Wilhelm Göring, Rudolf Hess, Joachim von Ribbentrop, Robert Ley, Wilhelm Keitel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Walter Funk, Hjalmar Schacht, Gustav Krupp von Bohlen und Halbach, Karl Dönitz, Erich Raeder, Baldur von Schirach, Fritz Sauckel, Alfred Jodl, Martin Bormann, Franz von Papen, Artur Seyss-Inquart, Albert Speer, Constantin von Neurath, and Hans Fritzsche, individually and as members of any of the following groups namely: Die Reichsregierung (Reich Cabinet); Das Korps der Politischen Leiter der Nationalsozialistischen Deutschen Arbeiterpartei (Leadership Corps of the Nazi Party); Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei (commonly known as the “SS”) and including Der Sicherheitsdienst (commonly known as the “SD”); Die Geheime Staatspolizei (Secret State Police, commonly known as the “GESTAPO”); Die Sturmabteilungen der N.S.D.A.P. (commonly known as the “SA”) and the General Staff and High Command of the German Armed Forces.

Robert Ley committed suicide on 25th October, 1945.

Gustav Krupp von Bohlen und Halbach – Trial postponed by order of Tribunal.

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M. Edgar Faure

ASSISTANT PROSECUTORS

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M. Constant Quatre

M. Serge Fuster

M. Jacques Herzog

M. Jean-Jacques Lanoire

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Colonel D.S. Karev

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Seyss-Inquart	Dr. Gustav Steinbauer
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von Neurath	Freiherr Otto von Lüdinghausen
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SS	Ludwig Babel Horst Pelckmann (associate counsel)
SD	Dr. Hans Gawlik
SA	Georg Boehm
Gestapo	Dr. Rudolf Merkel
General Staff and High Command	Dr. Hans Laternser

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THE PRESIDENT: The judgment of the International Military Tribunal will now be read. I shall not read the title and the formal parts.

JUDGMENT

On the 8th August, 1945, the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic, and the Government of the Union of Soviet Socialist Republics entered into an agreement establishing this Tribunal for the trial of war criminals whose offences have no particular geographical location. In accordance with Article 5, the following Governments of the United Nations have expressed their adherence to the Agreement:

Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxemburg, Haiti, New Zealand, India, Venezuela, Uruguay, and Paraguay.

By the Charter annexed to the Agreement, the constitution, jurisdiction, and functions of the Tribunal were defined.

The Tribunal was invested with power to try and punish persons who had committed Crimes Against Peace, War Crimes and Crimes Against Humanity as defined in the Charter.

The Charter also provided that at the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.

In Berlin, on the 18th October, 1945, in accordance with Article 14 of the Charter, an indictment was lodged against the defendants named in the caption above, who had been designated by the Committee of the Chief Prosecutors of the signatory Powers as major war criminals.

A copy of the Indictment in the German language was served upon each defendant in custody at least thirty days before the Trial opened.

This Indictment charges the defendants with Crimes Against Peace by the planning, preparation, initiation and waging of wars of aggression, which were also wars in violation of international treaties, agreements and assurances, with War Crimes and with Crimes Against Humanity. The defendants are also charged with participating in the formulation or execution of a Common Plan Or Conspiracy to commit all these crimes. The Tribunal was further asked by the prosecution to declare all the named groups or organizations to be criminal within the meaning of the Charter.

The defendant Robert Ley committed suicide in prison on the 25th October, 1945. On the 15th November, 1945, the Tribunal decided that the defendant Gustav Krupp von Bohlen und Halbach could not then be tried because of his physical and mental condition, but that the charges against him in the Indictment should be retained for trial thereafter, if the physical and mental condition of the defendant should permit.

On the 17th November, 1945, the Tribunal decided to try the defendant Bormann in his absence, under the provisions of Article 12

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of the Charter. After argument and consideration of full medical reports, and a statement from the defendant himself, the Tribunal decided on the 1st December, 1945, that no grounds existed for a postponement of the trial against the defendant Hess because of his mental condition. A similar decision was made in the case of the defendant Streicher.

In accordance with Articles 16 and 23 of the Charter, counsel were either chosen by the defendants in custody themselves, or at their request were appointed by the Tribunal. In his absence the Tribunal appointed counsel for the defendant Bormann, and also assigned counsel to represent the named groups or organizations.

The Trial, which was conducted in four languages – English, Russian, French, and German – began on the 20th November, 1945, and pleas of "Not Guilty" were made by all the defendants except Bormann.

The hearing of evidence and the speeches of counsel concluded on the 31st August, 1946.

Four hundred and three open sessions of the Tribunal have been held. Thirty-three witnesses gave evidence orally for the prosecution against the individual defendants, and sixty-one witnesses, in addition to nineteen of the defendants, gave evidence for the defence.

A further 143 witnesses gave evidence for the defence by means of written answers to interrogatories.

The Tribunal appointed Commissioners to hear evidence relating to the organizations, and 101 witnesses were heard for the defence before the Commissioners, and 1,809 affidavits from other witnesses were submitted. Six reports were also submitted, summarizing the contents of a great number of further affidavits.

38,000 affidavits, signed by 155,000 people, were submitted on behalf of the Political Leaders; 136,213 on behalf of the SS; 10,000 on behalf of the SA; 7,000 on behalf of the SD; 3,000 on behalf of the General Staff and OKW; and 2,000 on behalf of the Gestapo.

The Tribunal itself heard twenty-two witnesses for the organizations. The documents tendered in evidence for the prosecution of the individual defendants and the organizations numbered several thousands. A complete stenographic record of everything said in Court has been made, as well as an electrical recording of all the proceedings.

Copies of all the documents put in evidence by the prosecution have been supplied to the defence in the German language. The applications made by the defendants for the production of witnesses and documents raised serious problems in some instances, on account of the unsettled state of the country. It was also necessary to

limit the number of witnesses to be called, in order to have an expeditious hearing, in accordance with Article 18 (c) of the Charter. The Tribunal, after examination, granted all those applications which in its opinion were relevant to the defence of any defendant or named group or organization, and were not cumulative. Facilities were provided for obtaining those witnesses and documents granted, through the office of the General Secretary established by the Tribunal.

Much of the evidence presented to the Tribunal on behalf of the prosecution was documentary evidence, captured by the Allied armies in German Army headquarters, Government buildings, and elsewhere. Some of the documents were found in salt mines, buried in the ground, hidden behind false walls and in other places thought to be secure from discovery. The case, therefore, against the defendants rests in a large measure on documents of their own making, the authenticity of which has not been challenged except in one or two cases.

THE CHARTER PROVISIONS

The individual defendants are indicted under Article 6 of the Charter, which is as follows:

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"Article 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing:

(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity:

(c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

These provisions are binding upon the Tribunal as the law to be applied to the case. The Tribunal will later discuss them in more detail; but, before doing so, it is necessary to review the facts. For the purpose of showing the background of the aggressive war and war crimes charged in the Indictment, the Tribunal will begin by reviewing some of the events that followed the First World War, and in particular, by tracing the growth of the Nazi Party under Hitler's leadership to a position of supreme

power from which it controlled the destiny of the whole German people, and paved the way for the alleged commission of all the crimes charged against the defendants.

THE NAZI REGIME IN GERMANY

THE ORIGIN AND AIMS OF THE NAZI PARTY

On the 5th January, 1919, not two months after the conclusion of the Armistice which ended the First World War, and six months before the signing of the Peace Treaties at Versailles, there came into being in Germany a small political party called the German Labour Party. On the 12th September, 1919, Adolf Hitler became a member of this party, and at the first public meeting held in Munich, on the 24th February, 1920, he announced the party's programme. That programme, which remained unaltered until the party was dissolved in 1945, consisted of twenty-five points, of which the following five are of particular interest on account of the light they throw on the matters with which the Tribunal is concerned:

> "Point 1. We demand the unification of all Germans in the Greater Germany, on the basis of the right of self-determination of peoples.
>
> Point 2. We demand equality of rights for the German people in respect to the other nations; abrogation of the peace treaties of Versailles and Saint Germain.
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>
> Point 3. We demand land and territory for the sustenance of our people, and the colonization of our surplus population.
>
> Point 4. Only a member of the race can be a citizen. A member of the race can only be one who is of German blood, without consideration of creed. Consequently no Jew can be a member of the race . . . .
>
> Point 22. We demand abolition of the mercenary troops and formation of a national army."

Of these aims, the one which seems to have been regarded as the most important, and which figured in almost every public speech, was the removal of the "disgrace" of the Armistice, and the restrictions of the peace treaties of Versailles and Saint Germain. In a typical speech at Munich on the 13th April, 1923, for example, Hitler said, with regard to the Treaty of Versailles:

> "The treaty was made in order to bring twenty million Germans to their deaths, and to ruin the German nation . . . . At its foundation our movement formulated three demands:
>
> 1. Setting aside of the Peace Treaty.
>
> 2. Unification of all Germans.
>
> 3. Land and soil to feed our nation."

The demand for the unification of all Germans in the Greater Germany was to play a large part in the events preceding the seizure of Austria and Czechoslovakia; the abrogation of the Treaty of Versailles was to become a decisive motive in attempting to justify the policy of the German Government; the demand for land was to be the justification for the acquisition of "living-space" at the expense of other nations; the expulsion of the Jews from membership of the race of German blood was to lead to

the atrocities against the Jewish people; and the demand for a national army was to result in measures of rearmament on the largest possible scale, and ultimately to war.

On the 29th July, 1921, the Party, which had changed its name to Nationalsozialistische Deutsche Arbeiter Partei (NSDAP) was reorganized, Hitler becoming the first "Chairman." It was in this year that the Sturmabteilung or SA was founded, with Hitler at its head, as a private para-military force, which allegedly was to be used for the purpose of protecting NSDAP leaders from attack by rival political parties, and preserving order at NSDAP meetings, but in reality was used for fighting political opponents on the streets. In March, 1923, the defendant Göring was appointed head of the SA.

The procedure within the Party was governed in the most absolute way by the "leadership principle" (Führerprinzip).

According to the principle, each Führer has the right to govern, administer, or decree, subject to no control of any kind and at his complete discretion, subject only to the orders he receives from above.

This principle applied in the first instance to Hitler himself as the Leader of the Party, and in a lesser degree to all other Party officials. All members of the Party swore an oath of "eternal allegiance" to the Leader.

There were only two ways in which Germany could achieve the three main aims above-mentioned: by negotiation, or by force. The twenty-five points of the NSDAP programme do not specifically mention the methods on which the leaders of the Party proposed to rely, but the history of the Nazi regime shows that Hitler and his followers were only prepared to negotiate on the terms that their demands were conceded, and that force would be used if they were not.

On the night of 8th November, 1923, an abortive Putsch took place in Munich. Hitler and some of his followers burst into a meeting in the Bürgerbräu Cellar which was being addressed by the Bavarian Prime Minister Kahr, with the intention of obtaining from him a decision to march forthwith on Berlin. On the morning of the 9th November, however, no Bavarian support was forthcoming, and Hitler's demonstration was met by the armed forces of the Reichswehr and the police. Only a few volleys were fired; and after a dozen of his followers had been killed,

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Hitler fled for his life, and the demonstration was over. The defendants Streicher, Frick and Hess all took part in the attempted rising. Hitler was later tried for high treason, and was convicted and sentenced to imprisonment. The SA was outlawed. Hitler was released from prison in 1924, and in 1925 the Schutzstaffel, or SS, was created, nominally to act as his personal bodyguard, but in reality to terrorize political opponents. This was also the year of the publication of *Mein Kampf*, containing the political views and aims of Hitler, which came to be regarded as the authentic source of Nazi doctrine.

THE SEIZURE OF POWER

In the eight years that followed the publication of *Mein Kampf*, the NSDAP greatly extended its activities throughout Germany, paying particular attention to the training of youth in the ideas of National Socialism. The first Nazi youth organization had come into existence in 1922, but it was in 1925 that the Hitler Jugend was officially recognized by the NSDAP. In 1931 Baldur von Schirach, who had joined the NSDAP in 1925, became Reich Youth Leader of the NSDAP.

The Party exerted every effort to win political support from the German people. Elections were contested both for the Reichstag and the Landtage. The NSDAP leaders did not make any serious attempt to hide the fact that their only purpose in entering German political life was in order to destroy the democratic structure of the Weimar Republic, and to substitute for it a National Socialist totalitarian regime which would enable them to carry out their avowed policies without opposition. In preparation for the day when he would obtain power in Germany, Hitler in January, 1929, appointed Heinrich Himmler as Reichsführer SS with the special task of building the SS into a strong but *élite* group which would be dependable in all circumstances.

On the 30th January, 1933, Hitler succeeded in being appointed Chancellor of the Reich by President von Hindenburg. The defendants Göring, Schacht and von Papen were active in enlisting support to bring this about. Von Papen had been appointed Reich Chancellor on the 1st June, 1932. On the 14th June, he rescinded the decree of the Bruening Cabinet of the 13th April, 1932, which had dissolved the Nazi para-military organizations, including the SA and the SS. This was done by agreement between Hitler and von Papen, although von Papen denies that it was agreed as early as the 28th May, as Dr. Hans Volz asserts in "Dates from the History of the NSDAP"; but that it was the result of an agreement was admitted in evidence by von Papen.

The Reichstag elections of the 31st July, 1932, resulted in a great accession of strength to the NSDAP, and von Papen offered Hitler the post of Vice Chancellor, which he refused, insisting upon the Chancellorship itself. In November, 1932, a petition signed by leading industrialists and financiers was presented to President Hindenburg, calling upon him to entrust the Chancellorship to Hitler; and in the collection of signatures to the petition Schacht took a prominent part.

The election of the 6th November, which followed the defeat of the Government, reduced the number of NSDAP members, but von Papen made further efforts to gain Hitler's participation, without success. On the 12th November, Schacht wrote to Hitler:

> "I have no doubt that the present development of things can only lead to your becoming Chancellor. It seems as if our attempt to collect a number of signatures from business circles for this purpose was not altogether in vain…."

After Hitler's refusal of the 16th November, von Papen resigned, and was succeeded by General von Schleicher; but von Papen still continued his activities. He met Hitler at the house of the Cologne banker, von Schröder, on the 4th January, 1933, and attended a meeting at the defendant Ribbentrop's house on the 22nd January, with the defendant Göring and others. He also had an interview

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with President Hindenburg on the 9th January, and from the 22nd January onwards he discussed officially with Hindenburg the formation of a Hitler Cabinet.

Hitler held his first Cabinet meeting on the day of his appointment as Chancellor, at which the defendants Göring, Frick, Funk, von Neurath and von Papen were present in their official capacities. On the 28th February, 1933, the Reichstag building in Berlin was set on fire. This fire was used by Hitler and his Cabinet as a pretext for passing on the same day a decree suspending the constitutional guarantees of freedom. The decree was signed by President Hindenburg and countersigned by Hitler and the defendant Frick, who then occupied the post of Reich Minister of the Interior. On the 5th March elections were held, in which the NSDAP obtained 288 seats of the total of 647. The Hitler Cabinet was anxious to pass an "Enabling Act" that would give them full legislative powers, including the power to deviate from the Constitution. They were without the necessary majority in the Reichstag to be able to do this constitutionally. They therefore made use of the decree suspending the guarantees of freedom and took into so-called "protective custody" a large number of Communist deputies and party officials. Having done this, Hitler introduced the "Enabling Act" into the Reichstag, and after he had made it clear that if it was not passed, further forceful measures would be taken, the act was passed on the 24th March, 1933.

THE PRESIDENT: I will now ask Mr. Justice Birkett to continue reading the judgment.

BY MR. JUSTICE BIRKETT:

THE CONSOLIDATION OF POWER

The NSDAP, having achieved power in this way, now proceeded to extend its hold on every phase of German life. Other political parties were prosecuted, their property and assets confiscated, and many of their members placed in concentration camps. On the 26th April, 1933, the defendant Göring founded in Prussia the Gestapo as a secret police, and confided to the deputy leader of the Gestapo that its main task was to eliminate political opponents of National Socialism and Hitler. On the 14th July, 1933, a law was passed declaring the NSDAP to be the only political party, and making it criminal to maintain or form any other political party.

In order to place the complete control of the machinery of government in the hands of the Nazi leaders, a series of laws and decrees were passed which reduced the powers of regional and local governments throughout Germany, transforming them into subordinate divisions of the Government of the Reich. Representative assemblies in the Läender were abolished, and with them all local elections. The Government then proceeded to secure control of the Civil Service. This was achieved by a process of centralization, and by a careful sifting of the whole Civil Service administration. By a law of the 7th April it was provided that officials "who were of non-Aryan descent" should be retired; and it was also decreed that "officials who, because of their previous political activity, do not offer security that they will exert themselves for the national State without reservation shall be discharged." The law of the 11the April, 1933, provided for the discharge of "all Civil Servants who belong to the Communist Party." Similarly, the judiciary was subjected to control. Judges were removed from the Bench for political or racial reasons. They were spied upon and

made subject to the strongest pressure to join the Nazi Party as an alternative to being dismissed. When the Supreme Court acquitted three of the four defendants charged with complicity in the Reichstag fire, its jurisdiction in cases of treason was thereafter taken away and given to a newly established "People's Court," consisting of two judges and five officials of the Party. Special courts were set up to try political crimes and only Party members were appointed as judges. Persons were arrested by the SS for political reasons, and detained in prisons and concentration camps; and the judges were

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without power to intervene in any way. Pardons were granted to members of the Party who had been sentenced by the judges for proved offences. In 1935 several officials of the Hohenstein concentration camp were convicted of inflicting brutal treatment upon the inmates. High Nazi officials tried to influence the Court, and after the officials had been convicted, Hitler pardoned them all. In 1942 "Judges' letters" were sent to all German judges by the Government, instructing them as to the "general lines" that they must follow.

In their determination to remove all sources of opposition, the NSDAP leaders turned their attention to the trade unions, the Churches and the Jews. In April, 1933, Hitler ordered the late defendant Ley, who was then staff director of the political organization of the NSDAP, "to take over the trade unions." Most of the trade unions of Germany were joined together in two large federations, the "Free Trade Unions" and the "Christian Trade Unions". Unions outside these two large federations contained only fifteen per cent of the total union membership. On the 21st April, 1933, Ley issued an NSDAP directive announcing a "co-ordination action" to be carried out on the 2nd May against the Free Trade Unions. The directive ordered that SA and SS men were to be employed in the planned "occupation of trade union properties and for the taking into protective custody of persons therewith concerned". At the conclusion of the action the official NSDAP Press service reported that the National Socialist Factory Cells Organization had "eliminated the old leadership of Free Trade Unions" and taken over the leadership themselves. Similarly, on the 3rd May, 1933, the NSDAP press service announced that the Christian trade unions "have unconditionally subordinated themselves to the leadership of Adolf Hitler." In place of the trade unions the Nazi Government set up a German Labour Front (DAF), controlled by the NSDAP, which, in practice, all workers in Germany were compelled to join. The chairmen of the unions were taken into custody and were subjected to ill-treatment, ranging from assault and battery to murder.

In their effort to combat the influence of the Christian Churches, whose doctrines were fundamentally at variance with National Socialist philosophy and practice, the Nazi Government proceeded more slowly. The extreme step of banning the practice of the Christian religion was not taken, but year by year efforts were made to limit the influence of Christianity on the German people, since, in the words used by the defendant Bormann to the defendant Rosenberg in an official letter, "the Christian religion and National Socialist doctrines are not compatible." In the month of June, 1941, the defendant Bormann issued a secret decree on the relation of Christianity and National Socialism. The decree stated that:

> "For the first time in German history the Führer consciously and completely has the leadership in his own hand. With the Party, its components and attached units, the Führer has created for

himself and thereby the German Reich Leadership, an instrument which makes him independent of the Treaty. . . . More and more the people must be separated from the Churches and their organs, the Pastor. . . Never again must an influence on leadership of the people be yielded to the Churches. This influence must be broken completely and finally. Only the Reich Government and, by its direction, the Party, its components and attached units, have a right to leadership of the people."

From the earliest days of the NSDAP, anti-Semitism had occupied a prominent place in National Socialist thought and propaganda. The Jews, who were considered to have no right to German citizenship, were held to have been largely responsible for the troubles with which the nation was afflicted following the war of 1914-1918. Furthermore, the antipathy to the Jews was intensified by the insistence which was laid upon the superiority of the Germanic race and blood. The second chapter of Book 1 of *Mein Kampf* is dedicated to what may be called the "Master Race" theory, the doctrine of Aryan superiority over all other races, and the right of Germans, in virtue of this superiority, to dominate and use other

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peoples for their own ends. With the coming of the Nazis into power in 1933, persecution of the Jews became official State policy. On the 1st April, 1933, a boycott of Jewish enterprises was approved by the Nazi Reich Cabinet, and during the following years a series of anti-Semitic laws were passed, restricting the activities of Jews in the Civil Service, in the legal profession, in journalism and in the armed forces. In September, 1935, the so called Nuremberg Laws were passed, the most important effect of which was to deprive Jews of German citizenship. In this way the influence of Jewish elements on the affairs of Germany was extinguished, and one more potential source of opposition to Nazi policy was rendered powerless.

In any consideration of the crushing of opposition, the massacre of the 30th June, 1934, must not be forgotten. It has become known as the "Röhm Purge" or "the blood bath" and revealed the methods which Hitler and his immediate associates, including the defendant Göring, were ready to employ to strike down all opposition and consolidate their power. On that day Röhm, the Chief of Staff of the SA since 1931, was murdered by Hitler's orders, and the "Old Guard" of the SA was massacred without trial and without warning. The opportunity was taken to murder a large number of people who at one time or another had opposed Hitler.

The ostensible ground for the murder of Röhm was that he was plotting to overthrow Hitler, and the defendant Göring gave evidence that knowledge of such a plot had come to his ears. Whether this was so or not it is not necessary to determine.

On 3rd July, the Cabinet approved Hitler's action and described it as "legitimate self-defence by the State."

Shortly afterwards Hindenburg died, and Hitler became both Reich President and Chancellor. At the Nazi-dominated plebiscite which followed, 38,000,000 Germans expressed their approval, and with the Reichswehr taking the oath of allegiance to the Führer, full power was now in Hitler's hands.

Germany had accepted the Dictatorship with all its methods of terror, and its cynical and open denial of the rule of law.

Apart from the policy of crushing the potential opponents of their regime, the Nazi Government took active steps to increase its power over the German population. In the field of education, everything was done to ensure that the youth of Germany was brought up in the atmosphere of National Socialism and accepted National Socialist teachings. As early as the 7th April, 1933, the law reorganizing the Civil Service had made it possible for the Nazi Government to remove all "subversive and unreliable teachers"; and this was followed by numerous other measures to make sure that the schools were staffed by teachers who could be trusted to teach their pupils the full meaning of the National Socialist creed. Apart from the influence of National Socialist teaching in the schools, the Hitler Youth Organization was also relied upon by the Nazi leaders for obtaining fanatical support from the younger generation. The defendant von Schirach, who had been Reich Youth Leader of the NSDAP since 1931, was appointed Youth Leader of the German Reich in June, 1933. Soon all the youth organizations had been either dissolved or absorbed by the Hitler Youth, with the exception of the Catholic Youth. The Hitler Youth was organized on strict military lines, and as early as 1933 the Wehrmacht was co-operating in providing pre-military training for the Reich Youth.

The Nazi Government endeavoured to unite the nation in support of their policies through the extensive use of propaganda. A number of agencies were set up whose duty was to control and influence the Press, the radio, films, publishing firms, etc., in Germany, and to supervise entertainment and cultural and artistic activities. All these agencies came under Göbbels' Ministry of the People's Enlightenment and Propaganda, which together with a corresponding organization in the NSDAP and the Reich Chamber of Culture was ultimately responsible for exercising this supervision. The defendant Rosenberg played a leading part in disseminating the

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National Socialist doctrines on behalf of the Party, and the defendant Fritzsche, in conjunction with Göbbels, performed the same task for the State.

The greatest emphasis was laid on the supreme mission of the German people to lead and dominate by virtue of their Nordic blood and racial purity; and the ground was thus being prepared for the acceptance of the idea of German world supremacy.

Through the effective control of the radio and the Press, the German people, during the years which followed 1933, were subjected to the most intensive propaganda in furtherance of the regime. Hostile criticism, indeed criticism of any kind, was forbidden, and the severest penalties were imposed on those who indulged in it.

Independent judgment, based on freedom of thought, was rendered quite impossible.

MEASURES OF REARMAMENT

During the years immediately following Hitler's appointment as Chancellor, the Nazi Government set about re-organizing the economic life of Germany, and in particular the armament industry. This was done on a vast scale and with extreme thoroughness.

It was necessary to lay a secure financial foundation for the building of armaments, and in April, 1936, the defendant Göring was appointed co-ordinator for raw materials

and foreign exchange, and empowered to supervise all State and Party activities in these fields. In this capacity he brought together the War Minister, the Minister of Economics, the Reich Finance Minister, the President of the Reichsbank and the Prussian Finance Minister to discuss problems connected with war mobilization, and on the 27th May, 1936, in addressing these men, Göring opposed any financial limitation of war production and added that "all measures are to be considered from the standpoint of an assured waging of war." At the Party Rally in Nuremberg in 1936, Hitler announced the establishment of the Four-Year Plan and the appointment of Göring as the Plenipotentiary in charge. Göring was already engaged in building a strong air force and on the 8th July, 1938, he announced to a number of leading German aircraft manufacturers that the German Air Force was already superior in quality and quantity to the English. On the 14th October, 1938, at another conference, Göring announced that Hitler had instructed him to organize a gigantic armament programme, which would make insignificant all previous achievements. He said that he had been ordered to build as rapidly as possible an air force five times as large as originally planned, to increase the speed of the rearmament of the Navy and Army, and to concentrate on offensive weapons, principally heavy artillery and heavy tanks. He then laid down a specific programme designed to accomplish these ends. The extent to which rearmament had been accomplished was stated by Hitler in his memorandum of the 9th October, 1939, after the campaign in Poland. He said:

> "The military application of our people's strength has been carried through to such an extent that within a short time at any rate it cannot be markedly improved upon by any manner of effort. . . .
>
> "The warlike equipment of the German people is at present larger in quantity and better in quality for a greater number of German divisions than in the year 1914. The weapons themselves, taking a substantial cross-section, are more modern than is the case with any other country in the world at this time. They have just proved their supreme war worthiness in their victorious campaign. . . . There is no evidence available to show that any country in the world disposes of a better total ammunition stock than the Reich. . . . The A.A. artillery is not equalled by any country in the world."

In this reorganization of the economic life of Germany for military purposes, the Nazi Government found the German armament industry quite willing to co-operate and to play its part in the rearmament programme. In April, 1933,

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Gustav Krupp von Bohlen submitted to Hitler, on behalf of the Reich Association of German Industry, a plan for the reorganization of German industry, which he stated was characterized by the desire to co-ordinate economic measures and political necessity. In the plan itself, Krupp stated that "the turn of political events is in line with the wishes which I myself and the board of directors have cherished for a long time." What Krupp meant by this statement is fully shown by the draft text of a speech which he planned to deliver in the University of Berlin in January, 1944, though the speech was in fact never delivered. Referring to the years 1919 to 1933, Krupp wrote:

> "It is the one great merit of the entire German war economy that it did not remain idle during those bad years, even though its activity could not be brought to light, for obvious reasons. Through years of secret work, scientific and basic groundwork was laid in order to be ready again to work for the German armed forces at the appointed hour, without loss of time or experience. . . . Only through the secret activity of German enterprise together with the

> experience gained meanwhile through the production of peace-time goods, was it possible after 1933 to fall into step with the new tasks arrived at, restoring Germany's military power."

In October, 1933, Germany withdrew from the International Disarmament Conference and the League of Nations. In 1935 the Nazi Government decided to take the first open steps to free itself from its obligations under the Treaty of Versailles. On the 10th March, 1935, the defendant Göring announced that Germany was building a military air force. Six days later, on the 16th March, 1935, a law was passed bearing the signatures, among others, of the defendants Göring, Hess, Frank, Frick, Schacht and von Neurath, instituting compulsory military service and fixing the establishment of the German Army at a peace-time strength of 500,000 men. In an endeavour to reassure public opinion in other countries, the Government announced on the 21st May, 1935, that Germany would, though renouncing the disarmament clauses, still respect the territorial limitations of the Versailles Treaty, and would comply with the Locarno Pacts. Nevertheless, on the very day of this announcement, the secret Reich Defence Law was passed and its publication forbidden by Hitler. In this law, the powers and duties of the Chancellor and other Ministers were defined, should Germany become involved in war. It is clear from this law that by May, 1935, Hitler and his Government had arrived at the stage in the carrying out of their policies when it was necessary for them to have in existence the requisite machinery for the administration and government of Germany in the event of their policy leading to war.

At the same time that this preparation of the German economy for war was being carried out, the German armed forces themselves were preparing for a rebuilding of Germany's armed strength.

The German Navy was particularly active in this regard. The official German naval historians, Assmann and Gladisch, admit that the Treaty of Versailles had only been in force for a few months before it was violated, particularly in the construction of a new submarine arm.

The publications of Captain Schuessler and Oberst Scherf, both of which were sponsored by the defendant Raeder, were designed to show the German people the nature of the Navy's effort to rearm in defiance of the Treaty of Versailles.

The full details of these publications have been given in evidence.

On the 12th May, 1934, the defendant Raeder issued the Top Secret armament plan for what was called the Third Armament Phase. This contained the sentence:

> "All theoretical and practical A-preparations are to be drawn up with a primary view to readiness for a war *without any alert period*."

One month later, in June, 1934, the defendant Raeder had a conversation with Hitler in which Hitler instructed him to keep secret the construction of U-boats and of warships over the limit of 10,000 tons which was then being undertaken.

And on 2nd November, 1934, the defendant Raeder had another conversation with Hitler and the defendant Göring, in which Hitler said that he considered it

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vital that the German Navy "should be increased as planned, as no war could be carried on if the Navy was not able to safeguard the ore imports from Scandinavia".

The large orders for building given in 1933 and 1934 are sought to be excused by the defendant Raeder on the ground that negotiations were in progress for an agreement between Germany and Great Britain, permitting Germany to build ships in excess of the provisions of the Treaty of Versailles. This agreement, which was signed in 1935, restricted the German Navy to a tonnage equal to one-third of that of the British except in respect of U-boats, where 45 per cent was agreed, subject always to the right to exceed this proportion after first informing the British Government and giving them an opportunity of discussion.

The Anglo-German Treaty followed in 1937, under which both Powers bound themselves to notify full details of their building programme at least four months before any action was taken.

It is admitted that these clauses were not adhered to by Germany.

In capital vessels, for example, the displacement details were falsified by twenty per cent, whilst in the case of U-boats, the German historians Assmann and Gladisch say:

> "It is probably just in the sphere of submarine construction that Germany adhered the least to the restrictions of the German-British Treaty."

The importance of these breaches of the Treaty is seen when the motive for this rearmament is considered. In the year 1940 the defendant Raeder himself wrote:

> "The Führer hoped until the last moment to be able to put off the threatening conflict with England until 1944-5. At that time the Navy would have had available a fleet with a powerful U-boat superiority, and a much more favourable ratio as regards strength in all other types of ships, particularly those designed for warfare on the high seas."

The Nazi Government, as already stated, announced on 21st May, 1935, their intention to respect the territorial limitations of the Treaty of Versailles. On 7th March, 1936, in defiance of that Treaty, the demilitarized zone of the Rhineland was entered by German troops. In announcing this action to the German Reichstag, Hitler endeavoured to justify the re-entry by references to the recently concluded alliances between France and the Soviet Union, and between Czechoslovakia and the Soviet Union. He also tried to meet the hostile reaction which he no doubt expected to follow this violation of the Treaty by saying:

> "We have no territorial claims to make in Europe."

THE COMMON PLAN OR CONSPIRACY AND AGGRESSIVE WAR

The Tribunal now turns to the consideration of the Crimes Against Peace charged in the Indictment. Count One of the Indictment charges the defendants with conspiring or having a Common Plan to Commit Crimes Against Peace. Count Two of the Indictment charges the defendants with committing specific Crimes Against Peace by planning, preparing, initiating, and waging wars of aggression against a number of other States. It will be convenient to consider the question of the existence of a

common plan and the question of aggressive war together, and to deal later in this Judgment with the question of the individual responsibility of the defendants.

The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world.

To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.

The first acts of aggression referred to in the Indictment are the seizure of Austria and Czechoslovakia; and the first war of aggression charged in the Indictment is the war against Poland begun on 1st September, 1939.

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Before examining that charge it is necessary to look more closely at some of the events which preceded these acts of aggression. The war against Poland did not come suddenly out of an otherwise clear sky; the evidence has made it plain that this war of aggression, as well as the seizure of Austria and Czechoslovakia, was pre-meditated and carefully prepared, and was not undertaken until the moment was thought opportune for it to be carried through as a definite part of the pre-ordained scheme and plan.

For the aggressive designs of the Nazi Government were not accidents arising out of the immediate political situation in Europe and the world; they were a deliberate and essential part of Nazi foreign policy.

From the beginning, the National Socialist movement claimed that its object was to unite the German people in the consciousness of their mission and destiny, based on inherent qualities of race, and under the guidance of the Führer.

For its achievement, two things were deemed to be essential: the disruption of the European order as it had existed since the Treaty of Versailles, and the creation of a Greater Germany beyond the frontiers of 1914. This necessarily involved the seizure of foreign territories.

War was seen to be inevitable, or at the very least, highly probable, if these purposes were to be accomplished. The German people, therefore, with all their resources, were to be organized as a great political-military army, schooled to obey without question any policy decreed by the State.

PREPARATION FOR AGGRESSION

In *Mein Kampf* Hitler had made this view quite plain. It must be remembered that *Mein Kampf* was no mere private diary in which the secret thoughts of Hitler were set down. Its contents were rather proclaimed from the housetops. It was used in the schools and universities and among the Hitler Youth, in the SS and the SA, and among the German people generally, even down to the presentation of an official copy to all newly-married people. By the year 1945 over 6,500,000 copies had been

circulated. The general contents are well known. Over and over again Hitler asserted his belief in the necessity of force as the means of solving international problems, as in the following quotation:

> "The soil on which we now live was not a gift bestowed by Heaven on our forefathers. They had to conquer it by risking their lives. So also in the future, our people will not obtain territory, and therewith the means of existence, as a favor from any other people, but will have to win it by the power of a triumphant sword."

Mein Kampf contains many such passages, and the extolling of force as an instrument of foreign policy is openly proclaimed.

The precise objectives of this policy of force are also set forth in detail. The very first page of the book asserts that "German-Austria must be restored to the great German Motherland," not on economic grounds, but because "people of the same blood should be in the same Reich."

The restoration of the German frontiers of 1914 is declared to be wholly insufficient, and if Germany is to exist at all, it must be as a world power with the necessary territorial magnitude.

Mein Kampf is quite explicit in stating where the increased territory is to be found:

> "Therefore we National Socialists have purposely drawn a line through the line of conduct followed by pre-war Germany in foreign policy. We put an end to the perpetual Germanic march towards the South and West of Europe, and turn our eyes towards the lands of the East. We finally put a stop to the colonial and trade policy of the pre-war times, and pass over to the territorial policy of the future.
>
> "But when we speak of new territory in Europe today, we must think principally of Russia and the border States subject to her."
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Mein Kampf is not to be regarded as a mere literary exercise, nor as an inflexible policy or plan incapable of modification.

Its importance lies in the unmistakable attitude of aggression revealed throughout its pages.

THE PLANNING OF AGGRESSION

Evidence from captured documents has revealed that Hitler held four secret meetings, to which the Tribunal proposes to make special reference, because of the light they shed upon the question of the common plan and aggressive war.

These meetings took place on 5th November, 1937, 23rd May, 1939, 22nd August, 1939, and 23rd November, 1939. At these meetings important declarations were made by Hitler as to his purposes, which are quite unmistakable in their terms.

The documents which record what took place at these meetings have been subject to some criticism at the hands of defending counsel.

Their essential authenticity is not denied, but it is said, for example, that they do not purport to be verbatim transcripts of the speeches they record, that the document

dealing with the meeting on 5th November, 1937, was dated five days after the meeting had taken place, and that the two documents dealing with the meeting of 22nd August, 1939, differ from one another, and are unsigned.

Making the fullest allowance for criticism of this kind, the Tribunal is of opinion that the documents are documents of the highest value, and that their authenticity and substantial truth are established.

They are obviously careful records of the events they describe, and they have been preserved as such in the archives of the German Government, from whose custody they were captured. Such documents could never be dismissed as inventions, nor even as inaccurate or distorted; they plainly record events which actually took place.

It will perhaps be useful to deal first of all with the meeting of 23rd November, 1939, when Hitler called his supreme commanders together. A record was made of what was said, by one of those present. At the date of the meeting, Austria and Czechoslovakia had been incorporated into the German Reich, Poland had been conquered by the German Armies, and the war with Great Britain and France was still in its static phase. The moment was opportune for a review of past events. Hitler informed the commanders that the purpose of the conference was to give them an idea of the world of his thoughts, and to tell them his decision. He thereupon reviewed his political task since 1919, and referred to the secession of Germany from the League of Nations, the denunciation of the Disarmament Conference, the order for rearmament, the introduction of compulsory armed service, the occupation of the Rhineland, the seizure of Austria, and the action against Czechoslovakia. He stated:

> "One year later, Austria came; this step also was considered doubtful. It brought about a considerable reinforcement of the Reich. The next step was Bohemia, Moravia, and Poland. This step also was not possible to accomplish in one campaign. First of all, the western fortification had to be finished. It was not possible to reach the goal in one effort. It was clear to me from the first moment that I could not be satisfied with the Sudeten German territory. That was only a partial solution. The decision to march into Bohemia was made. Then followed the erection of the Protectorate and with that the basis for the action against Poland was laid, but I was not quite clear at that time whether I should start first against the East and then in the West or vice versa. . . . Basically I did not organize the armed forces in order not to strike. The decision to strike was always in me. Earlier or later I wanted to solve the problem. Under pressure it was decided that the East was to be attacked first."
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This address, reviewing past events and reaffirming the aggressive intentions present from the beginning, puts beyond any question of doubt the character of the actions against Austria and Czechoslovakia, and the war against Poland.

For they had all been accomplished according to plan; and the nature of that plan must now be examined in a little more detail.

At the meeting of 23rd November, 1939, Hitler was looking back to things accomplished; at the earlier meetings now to be considered, he was looking forward, and revealing his plans to his confederates. The comparison is instructive.

The meeting held at the Reich Chancellery in Berlin on 5th November, 1937, was attended by Lt.-Col. Hoszbach, Hitler's personal adjutant, who compiled a long note of the proceedings, which he dated 10th November, 1937, and signed.

The persons present were Hitler, and the defendants Göring, von Neurath and Raeder, in their capacities as Commander-in-Chief of the Luftwaffe, Reich Foreign Minister, and Commander-in-Chief of the Navy respectively, General von Blomberg, Minister of War, and General von Fritsch, the Commander-in-Chief of the Army.

Hitler began by saying that the subject of the conference was of such high importance that in other States it would have taken place before the Cabinet. He went on to say that the subject matter of his speech was the result of his detailed deliberations, and of his experiences during his four and a half years of government. He requested that the statements he was about to make should be looked upon in the case of his death as his last will and testament. Hitler's main theme was the problem of living-space, and he discussed various possible solutions, only to set them aside. He then said that the seizure of living-space on the continent of Europe was therefore necessary, expressing himself in these words:

> "It is not a case of conquering people but of conquering agriculturally useful space. It would also be more to the purpose to seek raw material producing territory in Europe directly adjoining the Reich and not overseas, and this solution would have to be brought into effect for one or two generations. . . . The history of all times – Roman Empire, British Empire – has proved that every space expansion can only be effected by breaking resistance and taking risks. Even setbacks are unavoidable: neither formerly nor today has space been found without an owner; the attacker always comes up against the proprietor."

He concluded with this observation:

> "The question for Germany is where the greatest possible conquest could be made at the lowest cost."

Nothing could indicate more plainly the aggressive intentions of Hitler, and the events which soon followed showed the reality of his purpose. It is impossible to accept the contention that Hitler did not actually mean war; for after pointing out that Germany might expect the opposition of England and France, and analysing the strength and the weakness of those Powers in particular situations, he continued:

> "The German question can be solved only by way of force, and this is never without risk. . . . If we place the decision to apply force with risk at the head of the following expositions, then we are left to reply to the questions 'When?' and 'How?'. In this regard we have to decide upon three different cases."

The first of these three cases set forth a hypothetical international situation, in which he would take action not later than 1943 to 1945, saying:

> "If the Führer is still living then it will be his irrevocable decision to solve the German space problem not later than 1943 to 1945. The necessity for action before 1943 to 1945 will come under consideration in Cases two and three."

The second and third cases to which Hitler referred show the plain intention to seize Austria and Czechoslovakia, and in this connection Hitler said:

> "For the improvement of our military-political position, it must be our first aim in every case of entanglement by war to conquer Czechoslovakia and
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>
> Austria simultaneously in order to remove any threat from the flanks in case of a possible advance westwards."

He further added:

> "The annexation of the two States to Germany militarily and politically would constitute a considerable relief, thanks to shorter and better frontiers, the freeing of fighting personnel for other purposes, and the possibility of reconstituting new armies up to a strength of about twelve divisions."

This decision to seize Austria and Czechoslovakia was discussed in some detail; the action was to be taken as soon as a favourable opportunity presented itself.

The military strength which Germany had been building up since 1933 was now to be directed at the two specific countries, Austria and Czechoslovakia.

The defendant Göring testified that he did not believe at that time that Hitler actually meant to attack Austria and Czechoslovakia, but that the purpose of the conference was only to put pressure on von Fritsch to speed up the rearmament of the Army.

The defendant Raeder testified that neither he, nor von Fritsch, nor von Blomberg believed that Hitler actually meant war, a conviction which the defendant Raeder claims that he held up to 22nd August, 1939. The basis of this conviction was his hope that Hitler would obtain a "political solution" of Germany's problems. But all that this means, when examined, is the belief that Germany's position would be so good, and Germany's armed might so overwhelming, that the territory desired could be obtained without fighting for it. It must be remembered too that Hitler's declared intention with regard to Austria was actually carried out within a little over four months from the date of the meeting, and that within less than a year the first portion of Czechoslovakia was absorbed, and Bohemia and Moravia a few months later. If any doubts had existed in the minds of any of his hearers in November, 1937, after March, 1939, there could no longer be any question that Hitler was in deadly earnest in his decision to resort to war. The Tribunal is satisfied that Lt.-Col. Hoszbach's account of the meeting is substantially correct, and that those present knew that Austria and Czechoslovakia would be annexed by Germany at the first possible opportunity.

THE PRESIDENT: The Tribunal will now adjourn for ten minutes.

(A recress was taken.)

THE PRESIDENT: I will now ask M. Donnedieu de Vabres to continue the reading of the Judgment.

M. DONNEDIEU DE VABRES:

THE INVASION OF AUSTRIA

The invasion of Austria was a premeditated aggressive step in furthering the plan to wage aggressive wars against other countries. As a result Germany's flank was protected, that of Czechoslovakia being greatly weakened. The first step had been taken in the seizure of "Lebensraum"; many new divisions of trained fighting men had been acquired; and with the seizure of foreign exchange reserves, the rearmament programme had been greatly strengthened.

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UNITED NATIONS
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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

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S. Mussa

Or. : Eng.

TRIAL CHAMBER I

Before Judges: Navanethem Pillay, presiding
Erik Møse
Asoka de Zoysa Gunawardana

Registrar: Adama Dieng

Judgement of: 3 December 2003

THE PROSECUTOR

V.

FERDINAND NAHIMANA
JEAN-BOSCO BARAYAGWIZA
HASSAN NGEZE
Case No. ICTR-99-52-T

JUDGEMENT AND SENTENCE

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GLOSSARY

Akazu	"Little house"; used to refer to group of individuals close to President Habyarimana
CDR	Coalition pour la Défense de la République (Coalition for the Defence of the Republic)
CRP	Le Cercle des Républicains Progressistes (Circle of Progressive Republicans)
Gukora	To work; sometimes used to refer to killing Tutsi
~~*Gutsembatsemba*~~	~~"Kill them" in the imperative form~~
Icyitso/Ibyitso	Accomplice; RPF sympathizer/accomplice; sometimes used to refer to Tutsi
Impuzamugambi	"Those who have the same goal"; Name of youth wing of CDR
Inkotanyi	RPF soldier; sometimes used to refer to Tutsi
Inkuba	"Thunder"; Name of youth wing of MDR
Interahamwe	"Those who attack together"; Name of youth wing of MRND
Inyenzi	Cockroach; group of refugees set up in 1959 to overthrow the new regime; sympathizer of RPF; sometimes used to refer to Tutsi
Kangura	"Awaken" in the imperative form; Name of newspaper published in Kinyarwanda and French
MDR	Mouvement Démocratique Républicain (Democratic Republican Movement)
MRND	Mouvement Révolutionnaire National pour le Développement (National Revolutionary Movement for Development)
PL	Parti Libéral (Liberal Party)
PSD	Parti Social Démocrate (Social Democratic Party)
RDR	Rassemblement Républicain pour la Démocratie au Rwanda (Republican Assembly for the Democracy of Rwanda)
RPF	Rwandan Patriotic Front
RTLM	Radio Télévision Libre des Milles Collines
Rubanda nyamwinshi	Majority people, Hutu majority or the democratic majority of Rwanda
Tubatsembatsembe	"Let's kill them"

CHAPTER I

INTRODUCTION

1. International Criminal Tribunal for Rwanda

1. This Judgement in the case of *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza* and *Hassan Ngeze,* Case No. ICTR-99-52-T, is rendered by Trial Chamber I ("the Chamber") of the International Criminal Tribunal for Rwanda ("the Tribunal"), composed of Judges Navanethem Pillay, presiding, Erik Møse, and Asoka de Zoysa Gunawardana.

2. The Tribunal was established by United Nations Security Council Resolution 955 of 8 November 1994[1] after it had considered official United Nations reports which indicated that genocide and other systematic, widespread and flagrant violations of international humanitarian law had been committed in Rwanda.[2] The Security Council determined that this situation constituted a threat to international peace and security, and was convinced that the prosecution of persons responsible for serious violations of international humanitarian law would contribute to the process of national reconciliation and to the restoration and maintenance of peace in Rwanda. Accordingly, the Security Council established the Tribunal, pursuant to Chapter VII of the United Nations Charter.

3. The Tribunal is governed by the Statute annexed to Security Council Resolution 955 ("the Statute"), and by the Rules of Procedure and Evidence adopted by the Judges on 5 July 1995 and subsequently amended ("the Rules").

4. Pursuant to the provisions of the Statute, the Tribunal has the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994. Individual criminal responsibility, pursuant to Article 6, shall be established for acts falling within the Tribunal's material jurisdiction, as provided in Articles 2, 3, and 4.

2. The Accused

5. Ferdinand Nahimana was born on 15 June 1950, in Gatonde commune, Ruhengeri prefecture, Rwanda. From 1977, he was an assistant lecturer of history at the National University of Rwanda, and in 1978, he was elected to be Vice-Dean of the Faculty of Letters. In 1980, he was elected to be Dean of the faculty and remained in that position until 1981. From 1981 to 1982, he held the post of President of the Administrative

[1] U.N. Doc. S/RES/955 (1994).
[2] Preliminary Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994), Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994) (U.N. Doc. S/1994/1405) and Reports of the Special Rapporteur for Rwanda of the United Nations Commission on Human Rights (U.N. Doc. S/1994/1157, Annexes I and II).

Committee of the Ruhengeri campus of the University. He was Assistant Secretary-General for the Ruhengeri campus of the University from 1983 to 1984. In 1990, he was appointed Director of ORINFOR (Rwandan Office of Information) and remained in that post until 1992. In 1992, Nahimana and others founded a *comité d'initiative* to set up the company known as *Radio Télévision Libre des Mille Collines, S.A.* He was a member of the party known as *Mouvement Révolutionnaire National pour le Développement* (MRND).

6. Jean-Bosco Barayagwiza was born in 1950 in Mutura commune, Gisenyi prefecture, Rwanda. A lawyer by training, he was a founding member of the *Coalition pour la Défense de la République* (CDR) party, which was formed in 1992. He was a member of the *comité d'initiative*, which organized the founding of the company *Radio Télévision Libre des Mille Collines, S.A.* During this time, he also held the post of Director of Political Affairs in the Ministry of Foreign Affairs.

7. Hassan Ngeze was born on 25 December 1957 in Rubavu commune, Gisenyi prefecture, Rwanda.[3] From 1978, he worked as a journalist, and in 1990, he founded the newspaper *Kangura* and held the post of Editor-in-Chief. Prior to this, he was the distributor of the *Kanguka* newspaper in Gisenyi. He was a founding member of the *Coalition pour la Défense de la République* (CDR) party.

3. The Indictments

8. Ferdinand Nahimana is charged, pursuant to the Amended Indictment filed on 15 November 1999 (ICTR-96-11-I), with seven counts: conspiracy to commit genocide, genocide, direct and public incitement to commit genocide, complicity in genocide, and crimes against humanity (persecution, extermination and murder), pursuant to Articles 2 and 3 of the Statute. He is charged with individual responsibility under Article 6(1) of the Statute for these crimes, and is additionally charged with superior responsibility under Article 6(3) in respect of direct and public incitement to commit genocide and crimes against humanity (persecution). He stands charged mainly in relation to the radio station called *Radio Télévision Libre des Mille Collines* (RTLM).

9. Jean-Bosco Barayagwiza is charged, pursuant to the Amended Indictment filed on 14 April 2000 (ICTR-97-19-I), with nine counts: conspiracy to commit genocide, genocide, direct and public incitement to commit genocide, complicity in genocide, crimes against humanity (persecution, extermination and murder), and two counts of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Articles 2, 3 and 4 of the Statute. He is charged with individual responsibility under Article 6(1) of the Statute in respect of these counts, except the two counts relating to serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. He is additionally charged with superior responsibility under Article 6(3) of the Statute in respect of all the counts, except that of conspiracy to commit genocide. He stands charged mainly in relation to the radio station called RTLM and the CDR Party.

[3] T. 24 Mar. 2003, p. 38.

10. Hassan Ngeze is charged, pursuant to the Amended Indictment (ICTR-97-27-I) dated 10 November 1999, with seven counts: conspiracy to commit genocide, genocide, direct and public incitement to commit genocide, complicity in genocide, and crimes against humanity (persecution, extermination and murder), pursuant to Articles 2 and 3 of the Statute.[4] He is charged with individual responsibility under Article 6(1) of the Statute for these crimes, and is additionally charged with superior responsibility under Article 6(3) in respect of all but one of the crimes - conspiracy to commit genocide. He stands charged mainly in relation to the newspaper *Kangura*.

11. The Indictments are set out in full in Annex I of this Judgement.

12. Pursuant to motions for acquittal filed by all three accused, the Chamber, in a decision dated 25 September 2002, acquitted Nahimana and Barayagwiza of crimes against humanity (murder), and further acquitted Barayagwiza of the two counts of serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II, as the Prosecution had conceded that there was no evidence presented of these crimes.

4. Procedural History

4.1 Arrest and Transfer

Ferdinand Nahimana

13. On 27 March 1996, Nahimana was arrested in the Republic of Cameroon. An order for his provisional detention and transfer to the Tribunal's Detention Unit was issued in Arusha on 17 May 1996 by Judge Lennart Aspegren. The transfer order was not immediately implemented and Nahimana remained detained by the Cameroonian authorities. On 18 June 1996, Judge Aspegren, upon the application of the Prosecution, issued an order for the continued detention on remand of Nahimana, pursuant to Rule 40*bis*(D), and a request to the Government of the Republic of Cameroon to effect the transfer order dated 17 May 1996. On 6 January 1997, the President of the Republic of Cameroon issued Decree No. 97/007 authorizing the transfer of Nahimana to Arusha. Nahimana was transferred to the Tribunal's Detention Facility in Arusha on 23 January 1997.

Jean-Bosco Barayagwiza

14. Barayagwiza was arrested on or about 26 March 1996 and detained in the Republic of Cameroon. On 21 February 1997, the Court of Appeal of Cameroon rejected the Rwandan Government's request for extradition and ordered the release of Barayagwiza. The same day, the Prosecution made a request, pursuant to Rule 40, for the provisional detention of Barayagwiza, and he was rearrested on 24 February 1997. An

[4] The Amended Indictment originally filed on 22 November 1999 contained typographical errors relating to the counts charged, and a corrected version of the Amended Indictment was filed on 19 November 2002.

order for the transfer of Barayagwiza to the Tribunal's Detention Facility was issued on 3 March 1997 by Judge Lennart Aspegren. On 2 October 1997, Counsel for Barayagwiza, Justry P.L. Nyaberi, filed a motion seeking a *habeas corpus* order and his immediate release from detention in Cameroon, by reason of his lengthy detention without an indictment being brought against him. No further action was taken in respect of the motion. Barayagwiza was subsequently transferred to the Tribunal on 19 November 1997.

15. On 24 February 1998, Counsel for Barayagwiza filed a motion seeking an order to review and/or nullify Barayagwiza's arrest and provisional detention, as the arrest and detention violated his rights under the Statute and the Rules. An oral hearing of the motion was conducted on 11 September 1998, and on 17 November 1998, Trial Chamber II, composed of Judge William H. Sekule, presiding, Judge Yakov Ostrovsky and Judge Tafazzal H. Khan, dismissed the motion on the grounds that the Accused's rights were not violated by the length of the detention in Cameroon as the Accused was not initially held at the Prosecutor's request but that of the Rwandan and Belgian governments, and the period during which he was held at the Prosecutor's request did not violate his rights under Rule 40; the long delay in his transfer to the Tribunal by Cameroonian authorities was not a breach by the Prosecution; and his rights under Rule 40*bis* were not violated as the Indictment was confirmed before the Accused was transferred.

16. Counsel for Barayagwiza filed an appeal against the decision on 11 December 1998, submitting that the Chamber had made errors both in law and in fact. The Prosecution responded on 17 December 1998 by arguing that the interlocutory appeal had no legal basis under the Statute or the Rules, and that the notice of appeal was filed out of time. At the same time, the Prosecution filed a motion on 18 December 1998 to reject the Defence appeal for the same reasons. By an order dated 5 February 1999, the Appeals Chamber held that the appeal was admissible. On 3 November 1999, the Appeals Chamber allowed the appeal, ordering the immediate release of the Accused to the Cameroonian authorities and the dismissal of the Indictment against the Accused, on the grounds that the period of provisional detention was impermissibly lengthy, and his rights to be promptly charged, and to have an initial appearance without delay upon transfer to the Tribunal, were violated. The Chamber also noted that the Accused was never heard on his writ of *habeas corpus* filed on 2 October 1997.

17. On 5 November 1999, Counsel for Barayagwiza filed a notice of review, requesting a stay of the order for his release to Cameroon, in order that he might choose his final destination upon release. This notice was withdrawn on 17 November 1999, on the basis that the notice was being misused by the Prosecution to seek to change the decision of 3 November 1999 and to prolong the Accused's detention. The Prosecution subsequently informed the Appeals Chamber on 19 November 1999 of its intention to file a motion to review the decision of 3 November 1999, which motion was filed on 1 December 1999, arguing that in light of new facts regarding, *inter alia*, the period of detention in Cameroon at the Prosecutor's request, the extradition procedures of Cameroon and the delay of the Cameroonian authorities in transferring the Accused to the Tribunal, the impugned decision should be vacated and the Indictment reinstated. On

8 December 1999, the President of the Appeals Chamber stayed the execution of the impugned decision. Counsel for Barayagwiza filed a reply to the Prosecution's motion on 6 January 2000, arguing that there were no new facts as alleged by the Prosecution, and questioning the jurisdiction of the newly-constituted Appeals Chamber, and the jurisdiction of the Appeals Chamber to hear an "appeal" of an Appeal decision.[5] In its decision dated 31 March 2000, the Appeals Chamber confirmed that the Accused's rights had been violated but not as originally found, and altered the remedy provided in the impugned decision, from that of releasing the Accused and dismissing the Indictment, to monetary compensation if found not guilty, and a reduction in sentence if found guilty.

18. On 28 July 2000, Counsel for Barayagwiza applied for a reconsideration and/or review of this decision and a reinstatement of the 3 November 1999 decision, arguing new facts and alleging that the Prosecution used false documents in its submissions to the Appeals Chamber. The Prosecution opposed the motion on 1 September 2000, and the motion was dismissed by the Appeals Chamber on 14 September 2000.

Hassan Ngeze

19. Ngeze was arrested in Kenya on 18 July 1997 and transferred to the Tribunal's Detention Facility on the same day, pursuant to an order for transfer and provisional detention issued by Judge Laïty Kama on 16 July 1997. On 12 August 1997, the Prosecution requested an additional detention period of thirty days, which was granted by Judge Kama on 18 August 1997, pursuant to Rule 40*bis*(F). The Prosecution requested a further thirty-day extension of the detention period, pursuant to Rule 40*bis*(G), on 10 September 1997. Judge Navanethem Pillay, in an oral decision delivered on 16 September 1997, granted a final extension of twenty days, to terminate on 6 October 1997.

4.2 Proceedings Relating to the Indictments

Ferdinand Nahimana

20. The Prosecution submitted the initial Indictment in respect of Ferdinand Nahimana on 12 July 1996, charging him with four counts: conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide and crimes against humanity (persecution). The Indictment was confirmed on the same day by Judge Yakov Ostrovsky. Nahimana made his initial appearance on 19 February 1997 before Trial Chamber I, composed of Judge Laïty Kama, presiding, Judge William H. Sekule and Judge Navanethem Pillay, at which time he pleaded not guilty to all four counts. Counsel for Nahimana filed a motion on 17 April 1997 requesting annulment of the original Indictment and the release of Nahimana based on defects in the manner of service and form of the Indictment. On 24 November 1997, Trial Chamber I, composed of Judge Navanethem Pillay, presiding, Judge Laïty Kama and Judge William H. Sekule, ordered the Prosecution to amend the Indictment in certain respects by providing specific

[5] A similar reply was filed by the newly-appointed Counsel for Barayagwiza, Carmelle Marchessault and David Danielson, on 17 February 2000.

details of some allegations. Pursuant to the said order, the Prosecution filed an Amended Indictment on 19 December 1997.

21. In a motion filed on 22 April 1998, Counsel for Nahimana argued that the Amended Indictment was defective in that it did not reflect the amendments ordered by the Chamber on 24 November 1997. Following the Prosecution's response filed on 22 June 1998 opposing the said motion, Trial Chamber I, composed of Judge Navanethem Pillay, presiding, Judge Laïty Kama and Judge Tafazzal H. Khan, issued a decision on 17 November 1998 ordering the Prosecution to make amendments to the Amended Indictment with respect to certain aspects of the allegations of individual criminal responsibility under Article 6(1) and 6(3). On 1 December 1998, pursuant to the said decision, the Prosecution filed a further amended Indictment dated 26 November 1998.

22. By a motion filed on 8 February 1999, Counsel for Nahimana raised objections to the Indictment dated 26 November 1998, which included new allegations and a new count of crimes against humanity (extermination). The Prosecution filed its reply on 22 March 1999, and an oral hearing was held on 28 May 1999 before Trial Chamber I, composed of Judge Navanethem Pillay, presiding, Judge Laïty Kama and Judge Pavel Dolenc. Prior to a decision being rendered, the Prosecution filed a request on 19 July 1999 for leave to file an amended Indictment. The Prosecution sought, *inter alia*, to reframe the count of conspiracy to commit genocide and to add two new counts of genocide and crimes against humanity (murder). On 30 August 1999, the Chamber issued its decision on the Defence motion of 8 February 1999, ordering the Prosecution to delete the new count of crimes against humanity (extermination) and certain paragraphs containing new allegations, as no motion had been made by Prosecution to seek leave to make such amendments. An amended Indictment dated 3 September 1999 was subsequently filed in compliance with the decision.

23. With respect to the Prosecution motion of 19 July 1999, following the replies filed by Counsel for Nahimana on 15, 18 and 26 October 1999, oral submissions on 19 October 1999, and the Prosecution's supplementary brief filed on 30 October 1999, Trial Chamber I, composed of Judge Navanethem Pillay, presiding, Judge Erik Møse and Judge Asoka de Zoysa Gunawardana, rendered its decision on 5 November 1999, allowing the addition of the counts of genocide and crimes against humanity (murder and extermination). The final Amended Indictment, pursuant to which Nahimana was tried, was filed on 15 November 1999. On 25 November 1999, Nahimana pleaded not guilty to the three new counts, and his plea of not guilty was confirmed in relation to the amended count of conspiracy to commit genocide.

24. On 15 November 1999, Counsel for Nahimana appealed the decision of 5 November 1999, submitting, *inter alia*, that the Indictment contained facts falling outside the temporal jurisdiction of the Tribunal. Pending the appeal, Counsel for Nahimana filed a motion on 17 May 2000, seeking the withdrawal of certain paragraphs from the Amended Indictment of 15 November 1999, arguing that some were beyond the temporal jurisdiction of the Tribunal, others contained amendments not ordered by the Chamber, and still others were factually imprecise. The Prosecution opposed the motion on 1 June

2000, and argued against the admissibility of the appeal by way of its response filed on 14 July 2000. The Chamber dismissed the motion on 12 July 2000, noting with respect to the relevant paragraphs that the references in the Indictment to events prior to 1994 constituted an historical context, the amendments were not beyond the scope of the Chamber's decision, and the imprecision was not such as to render the Indictment defective. Counsel for Nahimana appealed this decision on 18 July 2000.

25. The Appeals Chamber decided this appeal and the appeal of 15 November 1999 together with an appeal by Counsel for Nahimana on the subject of joinder filed on 7 December 1999. All three appeals were dismissed in a single Appeals Chamber decision on 5 September 2000, which is discussed in more detail below in paragraphs 100-104.

Jean-Bosco Barayagwiza

26. The initial Indictment in respect of Jean-Bosco Barayagwiza was filed on 22 October 1997, charging him with seven counts: genocide, complicity to commit genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, and crimes against humanity (murder, extermination and persecution). The Indictment was confirmed by Judge Lennart Aspegren on 23 October 1997, charging six counts, the count of crimes against humanity (extermination) having been withdrawn by the Prosecution. Barayagwiza made his initial appearance on 23 February 1998 before Trial Chamber II, composed of Judge William H. Sekule, presiding, Judge Yakov Ostrovsky and Judge Tafazzal H. Khan, and pleaded not guilty to all six counts.

27. Counsel for Barayagwiza filed a motion immediately thereafter, on 24 February 1998, seeking to quash the Indictment on grounds of defects in the form of the Indictment. The Prosecution filed its response on 7 October 1998, and an oral hearing was conducted on 23 October 1998 before Trial Chamber II, composed of Judge William H. Sekule, presiding, Judge Yakov Ostrovsky and Judge Tafazzal H. Khan. Counsel for Barayagwiza filed two additional motions on 6 April 1998 and 24 February 1999, respectively seeking disclosure from the Prosecution of evidence, documents and witnesses, and clarification of terms used in the Indictment. Before these three motions had been ruled upon, the Prosecution filed a motion on 28 June 1998 requesting leave to file an amended Indictment based on new evidence arising from ongoing investigations. The Prosecution sought to add three new counts namely, crimes against humanity (extermination) and two counts of serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II, and to expand the count of conspiracy to commit genocide. Having found that the new counts were supported by the new facts, Trial Chamber I, composed of Judge Navanethem Pillay, presiding, Judge Erik Møse and Judge Asoka de Zoysa Gunawardana, granted the motion on 11 April 2000. The Amended Indictment, pursuant to which Barayagwiza was tried, was filed on 14 April 2000. The same day, 14 April 2000, Trial Chamber I rejected the three Defence motions mentioned above on the grounds that the motions had been rendered moot by the decision of 11 April 2000. On 18 April 2000, upon his refusal to plead, pleas of not guilty were entered on Barayagwiza's behalf in repect of the three new counts.

28. On 17 April 2000, Counsel for Barayagwiza appealed the 11 April 2000 decision, submitting that as the Appeals Chamber had found that the Accused's rights had been violated (see paragraphs 16 and 17 above), the Indictment was not valid to be amended, and further submitting that certain allegations fell outside the temporal jurisdiction of the Tribunal. The Prosecution opposed the appeal on 8 June 2000. Prior to the ruling of the Appeals Chamber, Counsel for Barayagwiza filed a motion on 15 May 2000 arguing lack of jurisdiction as the Indictment was not valid, and seeking a waiver of time limits under Rule 72. In its decision dated 6 June 2000, which also dealt with joinder issues, Trial Chamber I denied the motion for lack of jurisdiction but granted an extension of the relevant time limits. On 12 June 2000, Counsel for Barayagwiza appealed this decision, based on arguments similar to its appeal of 17 April 2000. The Appeals Chamber issued its decision on both appeals on 14 September 2000, dismissing both appeals, noting that the issue of temporal jurisdiction had been dealt with in its decision dated 5 September 2000, and further noting that there exists a valid Indictment against the Accused.

Hassan Ngeze

29. The initial Indictment in respect of Hassan Ngeze dated 30 September 1997 charged him with four counts: genocide, direct and public incitement to commit genocide and crimes against humanity (persecution and murder). Having considered that there was insufficient support for a *prima facie* case that the accused committed genocide, the Indictment was confirmed by Judge Lennart Aspegren on 3 October 1997 with the remaining three counts. Ngeze made his initial appearance on 20 November 1997 before Trial Chamber I, composed of Judge Laïty Kama, presiding, Judge Tafazzal H. Khan and Judge Navanethem Pillay, at which time he pleaded not guilty to all three counts.

30. On 1 July 1999, the Prosecution sought leave to file an Amended Indictment to add four new charges, that of conspiracy to commit genocide, genocide, complicity in genocide and crimes against humanity (extermination). The Prosecution argued that ongoing investigations had produced more information and the amendments sought would reflect the totality of the accused's alleged criminal conduct, and further submitted that no undue delay would be occasioned. Trial Chamber I, composed of Judge Navanethem Pillay, presiding, Judge Erik Møse and Judge Asoka de Zoysa Gunawardana, granted leave to amend the Indictment on 5 November 1999. Counsel for Ngeze appealed the decision on 13 November 1999, arguing, *inter alia*, that the Indictment contained allegations beyond the temporal jurisdiction of the Tribunal. The Prosecution responded on 21 February 2000, arguing that the appeal was inadmissible for non-compliance with Rule 72. On 15 November 1999, Counsel for Ngeze filed a motion with the Appeals Chamber for the suspension of trial proceedings. The Appeals Chamber rejected the motion on 25 November 1999, noting that as an Appeals Chamber, it has jurisdiction to consider appeals from Trial Chamber decisions, not motions. On 5 September 2000, the Appeals Chamber rendered its decision on the appeal of 13 November 1999, finding all grounds of appeal inadmissible save that concerning the temporal jurisdiction of the Tribunal. The substance of the decision has been discussed in paragraphs 100-104. The Amended Indictment dated 10 November 1999 was duly filed

on 22 November 1999.[6] During a hearing on 25 November 1999, the Chamber entered a plea of not guilty on behalf of Ngeze in respect of the new counts, pursuant to Rule 62(A)(iii), after he refused to plead to the new counts, stating that the Chamber had no jurisdiction whilst the appeal of 13 November 1999 was pending.

31. A motion for bill of particulars with respect to the Amended Indictment was filed by Counsel for Ngeze on 19 January 2000, to which the Prosecution responded on 3 March 2000, arguing that the motion was not founded in law. The Chamber held, in its decision dated 16 March 2000 denying the motion, that the motion was not based on the Statute or the Rules and lacked merit.

32. On 23 March 2000, Counsel for Ngeze filed a motion to dismiss the Indictment *in toto* as the Tribunal lacked subject matter jurisdiction to try the Accused for the free expression of his ideas. This was a contention challenged by the Prosecution in its response of 11 April 2000 which argued that the Accused was being tried for his alleged acts, not his right to freedom of expression. The Chamber rejected the motion on 10 May 2000, holding that there was an important difference between freedom of speech and the media on the one hand, and the spreading of messages of hatred or the incitement of heinous acts on the other, and further holding that whether the Accused's alleged acts were in the former or latter category was a substantive issue going to the merits of the case. Further, the Chamber denied costs of the motion on the basis that it was frivolous or an abuse of process.

33. Counsel for Ngeze filed a motion dated 27 April 2000 alleging defects in the form of the Amended Indictment, arguing that the addition of certain paragraphs is beyond the scope of the decision of 5 November 1999 and seeking specificity with respect to certain allegations. The Chamber rendered an oral decision on 26 September 2000, dismissing the motion on the basis that the decision of 5 November 1999 to add new counts necessarily implied the addition of new allegations, and that the imprecision complained of by Counsel for Ngeze did not prevent the Accused from understanding the charges against him, nor from preparing his defence. The Chamber also noted that the motion raised arguments similar to those raised in the Ngeze appeal of 13 November 1999, which were found inadmissible by the Appeals Chamber except for that relating to temporal jurisdiction, which was dismissed after consideration.

4.3 Joinder

34. By a motion dated 1 July 1999, the Prosecution moved for the joint trial of Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze, claiming that their alleged acts formed part of a common scheme. The Prosecution subsequently limited the motion to joinder of the cases of Nahimana and Ngeze. Following responses from Counsel for Nahimana and Ngeze on 18 November 1999 and oral submissions on 25 November 1999, the Chamber granted the motion on 30 November 1999, finding that

[6] The Amended Indictment filed on 22 November 1999 contained typographical errors relating to the counts charged, and a corrected version of the Amended Indictment was filed on 19 November 2002 (*see also supra* note 4).

there was sufficient support for the assertion that the two accused's alleged acts were part of a common scheme and in the course of the same transaction, and considering that the joinder would expedite the trial given the number of Prosecution witnesses common to both cases. Counsel for Nahimana appealed the decision on 7 December 1999, submitting, *inter alia*, that the Chamber had overstepped the bounds of its temporal jurisdiction, and Counsel for Ngeze appealed the decision on 10 December 1999, submitting the Chamber lacked jurisdiction on various grounds. The Prosecution responded on 21 February 2000, contending that the appeal was inadmissible under Rule 72. The decision of the Appeals Chamber, dismissing the appeals, was rendered on 5 September 2000. The substance of the decision on this issue has been discussed in paragraphs 100-104.

35. On 29 April 2000, Counsel for Ngeze filed a motion for separate trials, arguing that the joinder of the Nahimana and Ngeze trials violated Rule 48 of the Rules as the Accused had not been indicted together, and that there would be a conflict of interest as their defence strategies differed. The Prosecution filed a response on 22 June 2000, and on 12 July 2000, the Chamber issued its decision. Noting that Counsel for Ngeze was seeking to revisit issues dealt with in the 30 November 1999 decision, the Chamber nonetheless considered the motion as it raised new arguments. In denying the motion, the Chamber held that the joinder was justified by Rule 48*bis* and that the Defence had not shown a conflict of interest.

36. Pursuant to the joinder decision of 30 November 1999, Counsel for Ngeze filed a motion on 23 March 2000 arguing that Ngeze should be allowed to adopt and conform all motions filed on behalf of Nahimana in order to lessen the Parties' work and protect the Accused's rights. The Prosecution opposed the motion on 11 April 2000 and on 12 May 2000 the Chamber denied the motion on the basis that no authority had been invoked in its support.

37. By a motion filed on 10 April 2000, the Prosecution sought the joinder of the trials of Barayagwiza, Nahimana and Ngeze. Counsel for Barayagwiza and Counsel for Nahimana opposed the motion on 28 April 2000 and 30 April 2000, respectively. By its response on 14 May 2000, Counsel for Ngeze did not oppose the motion. On 6 June 2000, the Chamber granted the joinder motion on similar grounds as its decision of 30 November 1999.

38. Counsel for Barayagwiza filed a motion for severance and separate trial which was dismissed by the Chamber on 26 September 2000 in an oral decision, noting that the argument of conflict of interest had already been decided by the Chamber previously, and that the test for severance had not been met.

4.4 Documentary Evidence

39. Counsel for Nahimana filed a motion on 13 January 2000 arguing that the Prosecution had not complied with its disclosure obligations under Rules 66, 67 and 68, to which the Prosecution responded on 6 and 13 March 2000. The Chamber denied the

motion on 29 March 2000 on the grounds, *inter alia*, that the deadline for disclosure under Article 66(A)(ii) had not yet expired.

40. On 19 January 2000, Counsel for Ngeze filed a motion to compel the Prosecution to produce all evidence against the Accused, to which the Prosecution responded on 3 March 2000, opposing the motion on the basis that it was premature as the Prosecution had complied with its disclosure obligations under the Rules. In its decision of 16 March 2000, the Chamber denied the motion on the grounds that there was no specific provision in the Rules enabling the Defence to request a Trial Chamber to order complete discovery.

41. In an oral decision on 26 September 2000, the Chamber decided motions for the continuance of the trial, for suppression of Prosecution evidence, and for a stay of proceedings arising from an abuse of process, filed by Counsel for the three Accused. The Chamber found that the Prosecution had been dilatory in complying with its obligations under Rule 66 but that it did not amount to an egregious violation, and found that the Defence had not demonstrated material prejudice to the Accused. Consequently, all the motions were denied, except that of continuance to a date to be decided at the pre-trial conference following the open session.

42. On 23 March 2000, Counsel for Ngeze filed a motion requesting that a *subpoena duces tecum* be issued to the Minister of Justice of Rwanda to seek the production of certified court records and documents relating to the Accused's arrest in Rwanda, for the purpose of raising the defence of alibi by showing that the Accused was in prison at the time of the commission of the crimes charged. The Prosecution submitted on 11 April 2000 that there was no legal basis for a Trial Chamber to issue such a subpoena to the Government of Rwanda. Citing with approval a decision of the Appeals Chamber of the ICTY holding that the Tribunal did not possess the power to take enforcement measures against States and that therefore the term "subpoena" was inapplicable, the Chamber denied the motion on 10 May 2000 on the basis that it was beyond the jurisdiction of the Tribunal.

43. Counsel for Ngeze filed a motion on 14 May 2000 to unseal United Nations documents regarding the assassination of the Rwandan and Burundian presidents, arguing that part of its strategy was to prove the identity of the person who killed President Habyarimana. On the same day, Counsel for Barayagwiza filed a similar motion requesting a report prepared by Michael Hourigan, an ICTR investigator, on the assassination of the Rwandan and Burundian presidents. In two separate responses filed on 27 June 2000, the Prosecution did not oppose the motions, provided certain restrictions were applied to the use of the document. In its decision rendered on 7 July 2000, the Chamber directed the Registry to serve a copy of the document on the Defence and the Prosecution, and further directed that the document be used only for the purposes of the trial.

44. It was repeatedly submitted by Counsel for Ngeze that it was necessary for the Tribunal to translate the 71 Kinyarwanda issues of *Kangura* from the original

Kinyarwanda into French and English (the working languages of the Tribunal), in order for the Accused, who stands charged mainly in relation to the contents of the newspaper, to have a fair trial. This issue was raised by Counsel for Ngeze in the pre-trial conference on 26 September 2000. The Chamber issued a Scheduling Order dated 6 October 2000, holding that it would not be necessary to translate all issues of *Kangura*, as they were not all relevant and such extensive translation would be beyond the capacity of the Tribunal. However, extracts of *Kangura* relied upon by parties at trial would be translated. The Chamber suggested that Counsel seek the co-operation of their clients to have all the editions of Kangura read. Counsel for Ngeze sought to have this ruling reconsidered via an oral application on 23 October 2000, which was rejected by the Chamber as it had already been dealt with, although the Chamber invited Counsel to see the Presiding Judge to work out alternative mechanisms by which the issue could be resolved. Pursuant to a discussion in chambers, an agreement was adopted whereby Defence Counsel were free to enumerate issues that they wished to have translated. Defence Counsel selected Kangura issue numbers 1, 10, 20, 30 and 40, which translation was done and admitted into evidence as Prosecution Exhibit P 131. On 2 November 2000, Counsel for Ngeze attempted to reopen the issue in court and was reminded by the Chamber that it had been ruled upon. Ngeze raised the issue again in court on 19 February 2001, citing it as one of the reasons he had chosen not to attend at trial. The Chamber notes that the Accused are all native Kinyarwanda speakers, that Defence Counsel availed themselves of the opportunity to select issues for translation, and that copies of all issues within the custody of the Prosecution were furnished years ago to the Defence in hard copy and electronically on a CD-ROM. The Chamber further notes that the relevant extracts of *Kangura* relied upon by both the Prosecution and the Defence have been read into the trial record during the presentation of the Prosecution's and the Defence's cases, including simultaneous translations of the same into English and French. Therefore, English and French translations of the *Kangura* extracts relied upon by the parties to support their cases have been provided to the Chamber for its consideration.

45. On 23 November 2001, Counsel for Ngeze filed a motion to compel disclosure of Radio Muhabura broadcasts, citing due process of law and fairness to the Accused. Counsel for Nahimana had also previously requested the tapes in 1998. The Prosecution filed a report regarding this issue on 3 December 2001, stating that no Muhabura tapes had been discovered but that the Prosecution was continuing to search for these tapes. Given these developments, the Chamber orally declared the motion moot on 6 December 2001 but instructed the Prosecution to continue the search for the tapes. On 16 September 2002, the Prosecution disclosed summaries of newscasts of Radio Muhabura, RTLM and Radio Rwanda in its possession.

46. Pursuant to an *ex parte* application to the Chamber by Counsel for Nahimana regarding cooperation from the Federal Republic of Germany in searching archives and records held there, the Chamber issued to the Federal Republic of Germany a request on 23 September 2002 for cooperation in obtaining certain specified information.

47. In the course of the testimony of Prosecution expert witness Alison Des Forges, she referred to microfiche material held in the US State Department. The microfiche

material represents the results of a microfilming project undertaken by the US Government on behalf of the Tribunal to preserve the files in the possession of the Office of the Prosecutor as of July 1995. It includes internal memoranda and notes of the Prosecution, and records of interviews conducted by independent organizations relating to the involvement of specific individuals in mass killings. Counsel for Nahimana made oral requests for access to the material, and during a status conference held on 27 September 2002, Counsel for the three Accused requested access to the same. On 16 September 2002, Counsel for Nahimana filed a document alleging breaches of the Accused's right to a fair trial, arising from his inability to obtain documents from Rwanda and USA, including the microfiche material, and seeking the Chamber's assistance in this matter. The President of the Tribunal, Judge Navanethem Pillay, contacted the US Ambassador-at-large for War Crimes regarding access to the material. This extensive material, comprising 27,755 pages, was subsequently dispatched to Arusha. On 11 October 2002, the Prosecution filed an *ex parte* application to exclude certain documents from the defence inspection of the microfiche material, on the basis that some documents were privileged under Rule 70(A), and some documents would reveal the identity of witnesses not called in this trial. On 25 October 2002, the Chamber, after an examination of the material, granted the application in part, having found that it contained internal documents as defined by Rule 70(A) and documents revealing the identity of witnesses. However, the Chamber identified specific documents that were not internal documents and could be disclosed. The Chamber therefore ordered the Prosecution to make these available to the Defence for inspection. The material was subsequently provided to the Defence on a CD-ROM. On 21 January 2003, Counsel for Nahimana made a further oral application for inspection of the same material. The Chamber denied the application on 24 January 2003, noting that the material had already been disclosed to the Defence, which was seeking merely to have it in the form of a microfiche copy, rather than a CD-ROM, and further noting the efforts made by the Chamber in assisting the Defence to obtain this vast body of material that it currently possesses.

48. Counsel for Nahimana filed a motion on 13 May 2003 seeking a stay of proceedings due to breaches of fair trial proceedings, on the basis that the Defence for Nahimana had not been able to obtain necessary documents and tapes of radio broadcasts and speeches, in particular from Rwanda, in order to support its case. The Defence alleged that the Rwandan Government was withholding material from them. In its decision dated 5 June 2003 denying the motion, the Chamber noted that the Defence could not be certain that these materials still existed, and recalled the Chamber's efforts to assist the Defence to obtain documents by way of a request for State cooperation, including the microfiche material, and the assistance that had been provided by Rwanda to the Defence. The Chamber notes that Nahimana alluded during his testimony to certain documents that could prove his version of events, in particular, records relating to the dismissal of ORINFOR employees pursuant to a list he had compiled.[7] The Chamber accepts that not all documents, RTLM tapes or other material have been made available to the Defence, some of which, if still in existence, might have been helpful to the Accused's case. However, the Chamber considers that this is a question of the weight to

[7] T. 23 Sept. 2002, pp. 23-25.

be attached to such evidence, to be deliberated upon by the Chamber.

49. In addition, numerous motions and requests were made by all parties during the course of the trial, which were ruled upon orally by the Trial Chamber and which will not be detailed here.

4.5 Witnesses

50. During the trial, the Prosecution called 47 witnesses, and the Defence for the three accused called a total of 46 witnesses, with 13 testifying for Nahimana (including the Accused), 32 testifying for Ngeze (including the Accused) and one witness called by Counsel for Barayagwiza.

51. On 9 October 2000, Counsel for Ngeze filed a motion seeking to have Hassan Ngeze shielded from the view of Prosecution eyewitnesses during their testimony, on the basis that they were mistaken as to his identification, until Defence Counsel have elicited from the witness a detailed description of him. On 12 October 2000, the Chamber denied the motion on the grounds that the Defence would have the opportunity at trial to challenge the reliability of the identification.

52. Pursuant to a motion filed by the Defence for Ngeze for a medical, psychiatric and psychological examination of Ngeze, and after having heard the parties in a closed session on 19 February 2001, the Chamber granted the motion in a closed session on 20 February 2001. The resulting medical report verified that Ngeze was competent to stand trial. Subsequent to the report's findings, Counsel for Ngeze did not pursue the matter any further.

53. Pursuant to oral decisions on 19 March, 13 May, 20 May and 1 July 2002 delivered after the Chamber heard objections from Counsel for the three Accused, four Prosecution witnesses were qualified as experts: Mathias Ruzindana, Marcel Kabanda, Alison Des Forges and Jean-Pierre Chrétien. By its decisions dated 24 January 2003 and 25 February 2003 relating to expert witnesses for the Defence, the Chamber permitted Counsel for Nahimana to call three witnesses, Counsel for Barayagwiza to call one, and Counsel for Ngeze to call two, these decisions being subject to a determination of the expert status of the witnesses at a *voir dire* hearing. On 4 March 2003, Counsel for Nahimana appealed the decision of 25 February 2003, arguing that the evidence excluded by the Chamber was relevant and the exclusion constituted a violation of the Accused's rights to a fair trial. The appeal was deemed inadmissible and rejected by the Appeals Chamber on 28 March 2003. Roger Shuy, a witness called by Counsel for Ngeze, was provisionally admitted as an expert witness during a deposition at The Hague on 28 April 2003, subject to a ruling by the full bench of the Chamber. Similarly, on 1 May 2003, Fernand Goffioul, a witness called by Counsel for Barayagwiza, was provisionally admitted as an expert witness during a deposition at The Hague, subject to a ruling by the full bench of the Chamber. The Chamber has considered the qualifications of both witnesses and is satisfied that Roger Shuy qualifies as an expert in socio-linguistics. Regarding Fernand Goffioul, the Chamber notes that his report concerns the history of

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Criminal
Court

Original: **English**

No.: **ICC-01/09-01/11**
Date: **23 January 2012**

PRE-TRIAL CHAMBER II

Before: **Judge Ekaterina Trendafilova, Presiding Judge**
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE REPUBLIC OF KENYA
IN THE CASE OF THE PROSECUTOR V. WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY AND JOSHUA ARAP SANG

Public Document

Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor
Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

Counsel for William Samoei Ruto
Joseph Kipchumba Kigen-Katwa, David Hooper and Kioko Kilukumi Musau

Counsel for Henry Kiprono Kosgey
George Odinga Oraro, Julius Kemboy and Allan Kosgey

Counsel for Joshua Arap Sang
Joseph Kipchumba Kigen-Katwa, Joel Bosek and Philemon Koech

Legal Representatives of the Victims
Sureta Chana

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar
Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

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PRE-TRIAL CHAMBER II (the "Chamber") of the International Criminal Court (the "Court"), by majority, hereby renders this decision on the confirmation of charges pursuant to article 61(7) of the Rome Statute (the "Statute").

I. PROCEDURAL HISTORY

1. On 26 November 2009, the Prosecutor filed a request for authorization to commence an investigation into the situation in the Republic of Kenya.[1] On 31 March 2010, the Chamber authorized, by majority, the commencement of an investigation into the situation in the Republic of Kenya in relation to crimes against humanity within the jurisdiction of the Court committed between 1 June 2005 and 26 November 2009 (the "31 March 2010 Decision").[2]

2. On 15 December 2010, the Prosecutor submitted an application requesting the Chamber to issue summonses to appear for William Samoei Ruto ("Mr. Ruto"), Henry Kiprono Kosgey ("Mr. Kosgey") and Joshua Arap Sang ("Mr. Sang") (collectively "the Suspects").[3]

3. On 8 March 2011, the Chamber, by majority, decided that there were reasonable grounds to believe that the Suspects are criminally responsible for the crimes against humanity of murder, forcible transfer of population and persecution and summoned the Suspects to appear before it (the "Decision on Summons to Appear").[4]

4. Pursuant to this decision, the Suspects voluntarily appeared before the Court at the initial appearance hearing held on 7 April 2011. During the initial appearance, in accordance with articles 60 and 61 of the Statute and rule 121, of the Rules of Procedure and Evidence (the "Rules"), the Chamber, *inter alia*, satisfied itself that the Suspects had been informed of the charges against them and of their rights under the

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[1] ICC-01/09-3 and its annexes.
[2] Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr.
[3] ICC-01/09-30-Red.
[4] Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang", ICC-01/09-01/11-1.

Statute and set the date of the commencement of the confirmation of charges hearing for 1 September 2011.[5]

5. Since the initial appearance of the Suspects, the Chamber has been seized of a variety of procedural and legal issues, of which only the most important are outlined in the following sections. In total, the Chamber has received over 270 filings and has issued 85 decisions, including the present decision.

A. The Government of the Republic of Kenya's challenge to the admissibility of the case

6. On 31 March 2011, the Government of the Republic of Kenya filed the "Application on behalf of the Government of The Republic of Kenya pursuant to Article 19 of the ICC Statute", wherein it requested the Chamber to find that the case against the Suspects is inadmissible.[6] On 21 April 2011, the Government of the Republic of Kenya filed 22 annexes of additional material, amounting to over 900 pages, with which it sought to buttress its initial challenge.[7]

7. On 30 May 2011, the Chamber issued the "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", wherein it determined that the case against the Suspects is admissible.[8] On 30 August 2011, this decision was upheld by the Appeals Chamber.[9]

B. Disclosure of evidence

8. With the aim of proactively managing the disclosure of evidence and its communication to the Chamber prior to the confirmation of charges hearing, the Chamber, on 6 April 2011, issued the "Decision Setting the Regime for Evidence

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[5] ICC-01/09-01/11-T-1-ENG ET pp. 9, 11-15, 17.
[6] ICC-01/09-01/11-19, para. 80.
[7] ICC-01/09-01/11-64.
[8] ICC-01/09-01/11-101, p. 28.
[9] Appeals Chamber, "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", ICC-01/09-01/11-307.

Disclosure and Other Related Matters".[10] It established a principled approach to disclosure, wherein the parties were encouraged to disclose items of evidence in advance of the minimum requirements stipulated in rule 121(3) to (6), and (9) of the Rules. Subsequently, on 20 April 2011, the Chamber issued a decision establishing a calendar for disclosure.[11] It set a series of timelimits, which accommodated the estimated volume of evidence to be disclosed by the parties, as well as the Defence right to have adequate time and facilities to prepare, in accordance with article 67(1)(b) of the Statute.

9. As part of the disclosure process, the Chamber issued a number of decisions on the Prosecutor's requests for redactions under rule 81(2) and (4) of the Rules. On 24 June 2011, the Chamber issued the "First Decision on the Prosecutor's Requests for Redactions and Related Requests",[12] wherein it, *inter alia*, outlined the principled approach of the Chamber with respect to the Prosecutor's proposals for redactions as well as *proprio motu* redactions pursuant to rule 81(4) of the Rules. The disclosure process, as organized by the Chamber, developed in three tiers and the Chamber received 50 filings from the parties[13] and issued 17 decisions on issues of evidence disclosure and redactions. The Defence teams sought no redactions to their evidence. Following the first decision on redactions, the Chamber issued five further decisions concerning redactions between 28 June 2011 and 27 July 2011.[14]

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[10] Pre-Trial Chamber II, "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", ICC-01/09-01/11-44, p. 10.

[11] Pre-Trial Chamber II, "Decision on the 'Prosecution's application requesting disclosure after a final resolution of the Government of Kenya's admissibility challenge' and Establishing a Calendar for Disclosure Between the Parties", ICC-01/09-01/11-62, pp. 10-13.

[12] Pre-Trial Chamber II, "First Decision on the Prosecutor's Requests for Redactions and Related Requests", ICC-01/09-01/11-145-Conf-Red.

[13] A total of 5900 pages were submitted for redaction along with 794 documents with over 15000 pages of disclosed evidence overall.

[14] Pre-Trial Chamber II, "Redacted Second Decision on the Prosecutor's Requests for Redactions", ICC-01/09-01/11-152-Conf-Red; Pre-Trial Chamber II, "Redacted Third Decision on the Prosecutor's Requests for Redactions", ICC-01/09-01/11-195-Conf-Red; Pre-Trial Chamber II, "Redacted Fourth Decision on the Prosecutor's Requests for Redactions", ICC-01/09-01/11-218-Conf-Red; Pre-Trial Chamber II, "Redacted Fifth Decision on the Prosecutor's Request for Redactions", ICC-01/09-01/11-229-Conf-Red.

10. On 1 August 2011, the Prosecutor filed the Document Containing the Charges and its List of Evidence,[15] and on 15 August 2011 an amended version thereof (the "Amended DCC").[16] On 16 August 2011, the Defence teams of the Suspects filed their Lists of Evidence.[17] Together the parties have placed before the Chamber several thousand pages of evidence for the purpose of making a determination under article 61(7) of the Statute.

C. ***Participation of victims in the proceedings***

11. On 30 March 2011, the Chamber issued the "First Decision on Victims' Participation in the Case",[18] with a view to regulating the submission to the Chamber of applications to participate in the proceedings.

12. The Chamber received and assessed 394 victims' applications for participation in the present proceedings.[19] On 5 August 2011, the Chamber issued its decision on these applications,[20] wherein it, *inter alia*, admitted 327 victims as participants at the confirmation of charges hearing and in the related proceedings, appointed the Legal Representative of victims, and specified the scope of participatory rights of victim participants to be exercised, through the Legal Representative of victims, during the confirmation of charges hearing.

13. Beside the assessment of victims' applications for participation in the proceedings, the Chamber decided on a number of other victim-related issues, including the representation of victims' interests at the initial appearance hearing,[21]

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[15] ICC-01/09-01/11-242 and confidential annexes.
[16] ICC-01/09-01/11-261 and confidential annexes.
[17] ICC-01/09-01/11-266-Conf-AnxA and its *corrigendum*; ICC-01/09-01/11-268-AnxA; ICC-01/09-01/11-268-AnxB.
[18] Pre-Trial Chamber II, ICC-01/09-01/11-17.
[19] ICC-01/09-01/11-91; ICC-01/09-01/11-141; ICC-01/09-01/11-170.
[20] Pre-Trial Chamber II, "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings", ICC-01/09-01/11-249.
[21] Pre-Trial Chamber II, "Second Decision on the Motion of Legal Representative of Victim Applicants to Participate in Initial Appearance Proceedings and Article 19 Admissibility Proceedings", ICC-01/09-01/11-40; Pre-Trial Chamber II, "Decision on the Motion by Legal Representative of Victim Applicants to Participate in Initial Appearance Proceedings", ICC-01/09-01/11-14.

the access to confidential information by the Legal Representative of victims,[22] the access by the Prosecutor to unredacted victims' applications and the scope of the Chamber's assessment of the applications,[23] the reconsideration of appointment of the Legal Representative of victims[24] and the possibility for the Legal Representative of victims to make written submissions on specific issues of law and/or fact.[25]

D. Preparation for the confirmation of charges hearing

14. In preparation for the confirmation of charges hearing, the Chamber issued a number of case management decisions. Though the Prosecutor elected not to call live witnesses, the Defence teams initially proposed to call a maximum of 43 witnesses.[26] The Chamber, in light of the limited scope and purpose of the confirmation of charges hearing, instructed the Defence teams to call a maximum of 2 witnesses per suspect.[27] On 25 August 2011, the Chamber established the schedule for the confirmation of charges hearing, taking into account the observations of the parties, with a view to regulating the presentation of evidence, submissions, and witnesses.[28]

15. Pursuant to the decision on the schedule, on 30 August 2011, the Defence teams of Mr. Ruto and Mr. Sang filed the joint "Defence Challenge to Jurisdiction" ("Mr. Ruto's and Mr. Sang's Joint Jurisdictional Challenge").[29] On the same date, the

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[22] ICC-01/09-01/11-337. For the participant's submission see ICC-01/09-01/11-335.
[23] ICC-01/09-01/11-169. For the parties' submissions see ICC-01/09-01/11-102 and its annex and ICC-01/09-01/11-107-Conf.
[24] ICC-01/09-01/11-330. For the motion see ICC-01/09-01/11-314.
[25] ICC-01/09-01/11-274 and ICC-01/09-01/11-338. For the parties' submissions see ICC-01/09-01/11-263 and ICC-01/09-01/11-333.
[26] ICC-01/09-01/11-202-Conf-Exp; ICC-01/09-01/11-203-Conf-Exp-Anx; ICC-01/09-01/11-204-Conf-Exp-Anx.
[27] Pre-Trial Chamber II, "Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of *Viva Voce* Witnesses", ICC-01/09-01/11-221.
[28] Pre-Trial Chamber II, "Decision on the Schedule for the Confirmation of Charges Hearing", ICC-01/09-01/11-294.
[29] ICC-01/09-01/11-305 and its annexes.

Chamber received the challenge filed by Mr. Kosgey ("Mr. Kosgey's Jurisdictional Challenge").[30]

16. In compliance with the Chamber's oral directions,[31] on 16 September 2011, the Prosecutor[32] and the Legal Representative of victims[33] submitted their written observations on the Defence jurisdictional challenges.

17. In addition to the major topics as presented above, the Chamber considered other issues and rendered decisions in preparation for the confirmation hearing, in particular the parties' requests for the postponement of the confirmation hearing;[34] the request by Mr. Ruto to waive his right to be present at the confirmation hearing;[35] and witness familiarization issues.[36]

E. The confirmation of charges hearing

18. The confirmation of charges hearing commenced on 1 September 2011 and concluded on 8 September 2011. The parties first presented their submissions regarding procedural matters and then presented their respective cases, with two Defence teams calling two *viva voce* witnesses each. On the first day of the hearing, during the opening statement of their resepctive Defence teams, Mr. Ruto and Mr. Sang exercised their right under article 67(1)(h) of the Statute to make an unsworn oral statement. Further, consistent with the Chamber's ruling in its first decision on victims, the Chamber entertained and granted oral requests from the Legal Representative of victims to question witnesses.

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[30] "APPLICATION ON BEHALF OF HENRY KIPRONO KOSGEY PURSUANT TO ARTICLE 19 OF THE ICC STATUTE", ICC-01/09-01/11-306.
[31] ICC-01/09-01/11-T-5-ENG ET, pp. 15-16.
[32] ICC-01/09-01/11-334.
[33] ICC-01/09-01/11-332.
[34] ICC-01/09-01/11-260; ICC-01/09-01/11-286; ICC-01/09-01/11-301. For the parties' and participants' submissions see ICC-01/09-01/11-255 and its annexes, ICC-01/09-01/11-256; ICC-01/09-01/11-258; ICC-01/09-01/11-280; ICC-01/09-01/11-283; ICC-01/09-01/11-284; ICC-01/09-01/11-287 and its annexes; ICC-01/09-01/11-288 and its annex; ICC-01/09-01/11-295.
[35] ICC-01/09-01/11-302. For the respective party's submission see ICC-01/09-01/11-299 and its annex.
[36] See ICC-01/09-01/11-259 and its annex on the Unified Protocol on the practices used to prepare and familiarize witnesses for giving testimony, accepted by the Chamber, and the corresponding three reports of the Victims and Witnesses Unit; ICC-01/09-01/11-304.

19. Furthermore, at the close of the confirmation of charges hearing, the Chamber set time limits for the parties' final written submissions. In particular, the Chamber granted the Prosecutor and the Legal Representative of victims until 30 September 2011[37] and the Defence teams of the Suspects until 24 October 2011[38] to submit their final written observations.

20. On 30 September 2011, the Prosecutor[39] and the Legal Representative of victims[40] filed their final written observations (the "Prosecutor's/Legal Representative's Final Written Observations"). On 24 October 2011, the Defence teams of Mr. Ruto,[41] Mr. Kosgey[42] and Mr. Sang[43] filed their final written observations ("Mr. Ruto/Mr. Kosgey/Mr. Sang Final Written Observations").

F. Issuance of the decision on the charges

21. On 26 October 2011, the Chamber issued the "Decision on the Issuance of the Decision Pursuant to article 61(7) of the Rome Statute", wherein it decided to vary exceptionally the time limit prescribed by regulation 53 of the Regulations of the Court ("the Regulations"), to the effect that the present decision would be issued at the same time as the decision in the case of *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali.* [44]

II. THE CHARGES

22. In the Amended DCC, the Prosecutor charges the Suspects for the alleged crimes against humanity committed in different locations of the Republic of Kenya as follows:

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[37] ICC-01/09-01/11-T-12-ENG, p. 76, line 25; p. 77, lines 1-4.
[38] ICC-01/09-01/11-T-12-ENG, p. 76, line 25; p. 77, lines 1-4.
[39] ICC-01/09-01/11-345.
[40] ICC-01/09-01/11-344.
[41] ICC-01/09-01/11-355.
[42] ICC-01/09-01/11-353.
[43] ICC-01/09-01/11-354.
[44] Pre-Trial Chamber II, "Decision on the Issuance of the Decision Pursuant to Article 61(7) of the Rome Statute", ICC-01/09-01/11-357.

Count 1 (RUTO and KOSGEY)
Murder constituting a crime against humanity
(Article 7(1)(a) and Article 25(3)(a) of the Rome Statute)

From on or about 30 December 2007 to the end of January 2008, WILLIAM SAMOEI RUTO and HENRY KIPRONO KOSGEY committed or contributed to the commission of crimes against humanity in the form of murder in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town, and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya, in violation of Articles 7(1)(a) and 25(3)(a) of the Rome Statute.

Count 2 (SANG)
Murder constituting a crime against humanity
(Article 7(1)(a) and Article 25(3)(d) of the Rome Statute)

From on or about 30 December 2007 to the end of January 2008, JOSHUA ARAP SANG, as part of a group of persons, including WILLIAM RUTO and HENRY KOSGEY, acting with a common purpose, committed or contributed to the commission of crimes against humanity in the form of murder in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town, and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya, in violation of Articles 7(1)(a) and 25(3)(d) of the Rome Statute.

Count 3 (RUTO and KOSGEY)
Deportation or forcible transfer of population
constituting a crime against humanity
(Article 7(1)(d) and Article 25(3)(a) of the Rome Statute)

From on or about 30 December 2007 to the end of January 2008, WILLIAM SAMOEI RUTO and HENRY KIPRONO KOSGEY as co-perpetrators, committed or contributed to the commission of crimes against humanity in the form of deportation or forcible transfer of population in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya in violation of Articles 7(1)(d) and 25(3)(a) of the Rome Statute.

Count 4 (SANG)
Deportation or forcible transfer of population
constituting a crime against humanity
(Article 7(1)(d) and Article 25(3)(d) of the Rome Statute)

From on or about 30 December 2007 to the end of January 2008, JOSHUA ARAP SANG as part of a group of persons, including WILLIAM RUTO and HENRY KOSGEY, acting with a common purpose, committed or contributed to the commission of crimes against humanity

in the form of deportation or forcible transfer of population in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya in violation of Articles 7(1)(d) and 25(3)(d) of the Rome Statute.

Count 5 (RUTO AND KOSGEY)
Persecution as a crime against humanity
(Article 7(1)(h) and Article 25(3)(a) of the Rome Statute)

From 30 December 2007 to the end of January 2008, WILLIAM SAMOEI RUTO, and HENRY KIPRONO KOSGEY as co-perpetrators, committed or contributed to the commission of crimes against humanity in the form of persecution, when co-perpetrators and/or persons belonging to their group intentionally and in a discriminatory manner targeted civilians based on their political affiliation, committing murder, torture, and deportation or forcible transfer of population, in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya, in violation of Articles 7(1)(h) and 25(3)(a) of the Rome Statute.

Count 6 (SANG)
Persecution as a crime against humanity
(Article 7(1)(h) and Article 25(3)(d) of the Rome Statute)

From on or about 30 December 2007 to the end of January 2008, JOSHUA ARAP SANG, as part of a group of persons, including WILLIAM RUTO and HENRY KOSGEY, acting with a common purpose, committed or contributed to the commission of crimes against humanity in the form of persecution, when co-perpetrators and/or persons belonging to their group intentionally and in a discriminatory manner targeted civilians based on their political affiliation, committing murder, torture, and deportation or forcible transfer of population, in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya, in violation of Articles 7(1)(h) and 25(3)(d) of the Rome Statute.

III. JURISDICTION AND ADMISSIBILITY

23. Article 19(1) of the Statute provides that "[T]he Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17".

Doing well by doing good: Part 2

Human rights as a pillar of corporate social responsibility: In this second part to the series on business and human rights, John Balouziyeh and Catherine Gilfedder of Dentons discuss how human rights compliance is evolving into a legal obligation, with an insight into EU laws and on what corporates in the Middle East are doing to be more socially responsible.

Part I of this series, published in the October edition of *the Oath*, explored the legacy of John Ruggie, the late UN Special Representative on human rights and business enterprises, and discussed how corporations, following the frameworks he designed, can partake in human rights reporting, monitor their supply chains and implement human rights policies.

In this second part to the series on business and human rights, John and Catherine explore how human rights compliance is increasingly evolving into a legal obligation rather than a voluntary undertaking. They examine laws that have

already been passed in the EU requiring multinational corporations to partake in human rights monitoring and compliance, and the potential future of this trend in the Middle East.

INTRODUCTION

Part I of this series explored voluntary measures to promote human rights in business enterprises. Voluntary measures discussed in Part I include the adoption of business and human rights policies, monitoring company supply chains, ensuring that commercial agents comply with international human rights standards and participation in the UN Guiding Principles Reporting Framework. Aside from "voluntary" or "soft law"-inspired policy and corporate risk-driven measures, there is an ever-increasing momentum towards the concretisation of corporate obligations as binding legal norms.

HUMAN RIGHTS OBLIGATIONS OF MULTINATIONAL CORPORATIONS

The economic power, political influence and expanded geographical footprint of corporate actors means their potential to directly cause human rights abuses through their own actions or to assist with violations perpetrated by others is monumental. Perhaps due to such heightened risk, various jurisdictions have seen litigation alleging corporate "complicity" in state human rights abuses.

On the international law plane, many scholars consider corporates already bear certain direct international law obligations, including around respect for human rights (arising from their power, structural similarity to states and/or capacity to influence states); others consider such obligations likely to crystallise in the near future.

Aside from the question of direct corporate obligations under international law, negotiations continue towards a global UN treaty on business and human rights that would require signatory states to impose legally binding obligations on corporations in the human rights arena. In the meantime, a number of individual states have introduced legislation imposing legal obligations in the human rights arena upon corporations within their regulatory jurisdiction.

For example, France adopted its Loi de vigilance (Corporate Duty of Vigilance Law) in 2017. It establishes a legally binding obligation for French parent companies to identify and prevent adverse human rights and environmental impacts resulting from their own activities, from activities of companies they control, and from activities of their subcontractors and suppliers, with whom they have an established commercial relationship. Not all French companies are covered – the law targets only the largest, i.e. those which either employ (a) 5,000 within France; or (b) 10,000 in direct or indirect subsidiaries in France or abroad. Those covered are required to prepare, publish and implement a "vigilance plan", identifying and laying out remedial measures to prevent, inter alia, infringements of human rights. Failures to do so can result in judicial complaints and orders requiring the publication of a vigilance plan. Indeed, a number of cases involving alleged breaches of obligations under the loi de vigilance are already before

> “As such, for most companies it is only a matter of time before assessing and reporting upon human rights impacts becomes mandatory (possibly under the regimes of numerous jurisdictions in parallel) and so it makes obvious commercial sense to address areas of risk now.”

the French courts. The EU also plans to introduce binding obligations to carry out due diligence, including on human rights and environmental impacts: in March 2021, the European Parliament approved an outline proposal for an EU-wide Directive. As and when the legislation is finalised, it will require all member states to implement the obligations into their national legislation within a specified period. There have been calls for similarly comprehensive legislation in jurisdictions across Africa, Asia and in the US, building upon more targeted or sector-specific laws such as the UK Modern Slavery Act 2015 and California's Transparency in Supply Chains Act 2012.

As such, for most companies it is only a matter of time before assessing and reporting upon human rights impacts becomes mandatory (possibly under the regimes of numerous jurisdictions in parallel) and so it makes obvious commercial sense to address areas of risk now.

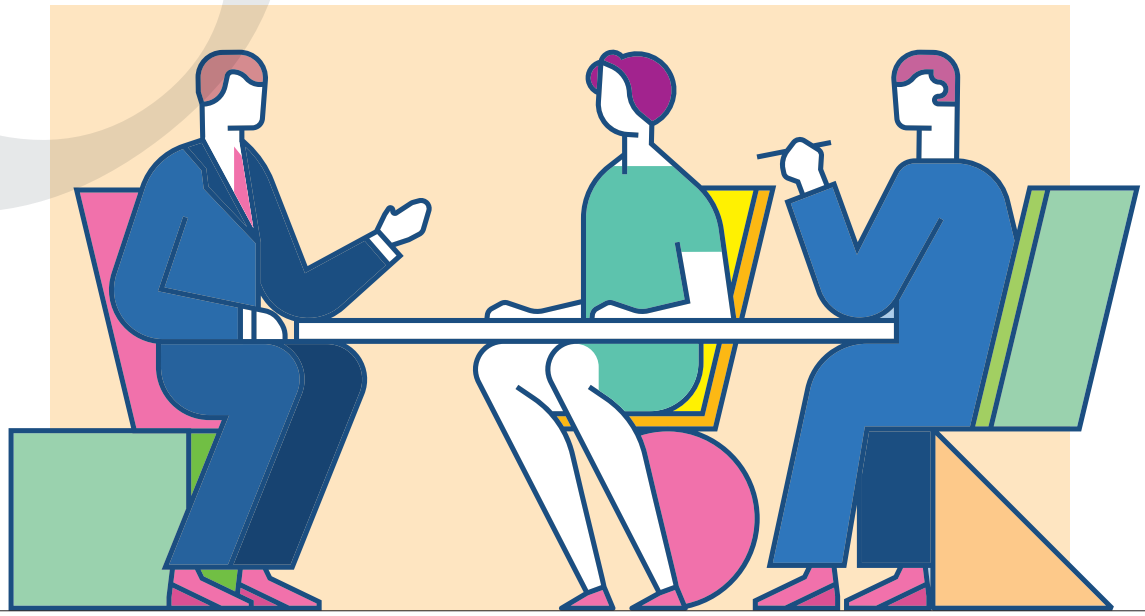
REGIONAL CONSIDERATIONS

Just as regional human rights treaties vary from one region to another, the specific provisions of human rights policies might appropriately vary from one location to another. What may be culturally acceptable in one country may not be in another.

This does not mean, however, that multinational corporations may set up operations in a particular destination in order to flout international human rights standards. While there are some variations of human rights standards across regions, first order human rights, such as the right to life and human dignity, are inherent and non-derogable. As these rights are universal, they can be characterised as first-order rights that tolerate no derogation. They are held by all people at all times simply by virtue of their being human. They are thus inalienable rights, because being or not being human is an inalterable fact of nature. It is not something that can be earned, merited or lost.

In this same vein, acts that inherently clash with first order human rights, such as torture and slavery, are prohibited under all circumstances. Just as states cannot circumvent prohibitions on torture or slavery by lodging reservations in international human rights treaties, corporations cannot circumvent customary prohibitions on torture or slavery by setting up operations in locations where human rights standards are not upheld or enforced. Jus cogens human rights norms create inescapable erga omnes obligations owed to the international community as a whole at all times and under all circumstances.

Some corporate counsels operating in the Middle East, fearing that adopting human rights policies might conflict with local law, express consternation in adopting human rights policies. The opposite is actually true. The overwhelming majority of countries in the Middle East are states parties to the principal international human rights treaties, including the International Covenant on Civil and Political Rights; the International Covenant on Economic,



Social and Cultural Rights; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Elimination of All Forms of Discrimination against Women; and the Convention on the Rights of the Child. Some human rights treaties, such as the International Convention on the Elimination of All Forms of Racial Discrimination, have been acceded to or ratified by every state in the Middle East.

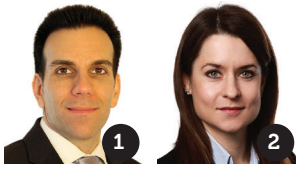
In addition, many countries across the Middle East have established commissions charged with implementing and enforcing human rights standards in accordance with international and Islamic law. The State of Qatar, for example, appointed the National Human Rights Committee to oversee and carry out investigations on human rights abuses in the country. Oman's Human Rights Commission acts as a national platform to promote and protect human rights among all segments and institutions of Omani society. The Federal National Council of the UAE passed a draft law in April of 2021 to establish a National Human Rights Commission to promote and protect human rights and freedoms in accordance with the provisions of the country's constitution and legislation. Saudi Arabia's Human Rights Commission has made major strides in Saudi Arabia, particularly in combatting human trafficking and forced slavery, while women's rights continue to be a central focus of Saudi Vision 2030, which mentions women not once or twice, but eight times, while setting as a national economic and national security priority the expansion of female entrepreneurship. Vision 2030 recognises that "Saudi women are yet another great asset. With over 50 percent of our university graduates being female, we will continue to develop their talents, invest in their productive capabilities and enable them to strengthen their future and contribute to the development of our society and economy." Saudi Vision 2030 seeks to "increase women's participation in the workforce from 22 per cent to 30 per cent," constituting a 36 per cent increase over the next nine years.

General counsels of companies operating in the Middle East can give thought to how their companies' human rights policies complement and reinforce the policies of their host countries, working hand-in-hand to reinforce human life and dignity.

PIONEERING A SOCIALLY RESPONSIBLE AND ENVIRONMENTALLY SUSTAINABLE BUSINESS MODEL

Dentons has extensive experience in the field of business and human rights, having advised a wide range of businesses, financial institutions, international organisations, NGOs and governments on international human rights law. A pioneer in the field of international law, Dentons can help companies navigate the burgeoning field of business and human rights and the proliferation of treaties, international declarations and guidelines in the field, including the OECD Guidelines for Multinational Enterprises, the International Labor Organization's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the American Convention on Human Rights, the Human Rights Declaration of the Association of Southeast Asian Nations and European Union Directive 2014/95/EU on corporate sustainability reporting. We help clients to comply with human rights reporting requirements, design human rights policies, and conduct due diligences of JV partners and supply chains to eliminate human trafficking, modern slavery and other abuses of international human rights law. Dentons has experience in developing protocols that mitigate the risk of human rights abuses and that support socially responsible and sustainable business models.

Catherine Gilfedder and John Balouziyeh regularly advise clients on business and human rights issues and risk management through investment structuring and ESG-related measures. They act for a number of corporations, international organisations and NGOs in claims before a range of courts and in designing and implementing human rights policies.



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Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo

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Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo

by Julia Graff

HUMAN RIGHTS ORGANIZATIONS HAVE long criticized corporations operating in war-torn countries for maximizing profits at the expense of human rights. Shareholders' primary concern with the bottom line often leads corporate decision-makers to purchase raw materials in developing countries at the cheapest price, regardless of the human rights credentials of their suppliers. Some corporations, increasingly concerned by allegations of complicity in human rights abuses, are implementing stronger monitoring devices to ensure that they comply with international standards.

Other companies intentionally engage in illegal business ventures with armed groups in places where weak judiciaries are unlikely to prosecute much-needed investors for corporate malfeasance. In countries experiencing ongoing civil conflict, the systematic elimination of independent judges, prosecutors, and witnesses willing to testify reduces the likelihood of prosecution and weakens the rule of law. This article explores the possibility of holding corporate officers and managers criminally responsible before the International Criminal Court (ICC) for grave human rights violations committed by their agents, employees, or business partners, using the Democratic Republic of Congo (DRC) as a test case.

Background

NEARLY TWO YEARS AFTER THE ROME STATUTE entered into force, the ICC is now almost fully operational. The Court has jurisdiction over war crimes, crimes against humanity, and genocide committed after July 1, 2002. The Office of the Prosecutor (OTP) may receive referrals of cases from the UN Security Council, states, individuals, and non-governmental organizations, but the OTP may also act on its own initiative to investigate and prosecute cases, with authorization from the Pre-Trial Chambers. The ICC may try the nationals of states parties as well as the nationals of non-ratifying states if they commit certain crimes within the territory of a state party. Under the principle of complementarity embodied in the Statute, the Court only has jurisdiction when the relevant states are unable or unwilling to prosecute. Chief Prosecutor Luis Moreno Ocampo made clear in his September 2003 policy paper that the OTP intends to focus the Court's limited resources on those leaders who bear the most responsibility for crimes, "such as the leaders of the state or organisation allegedly responsible for those crimes."

The ICC can prosecute heads of state, political and military leaders, and the leaders of irregular warring factions, yet corporations are not subject to criminal liability before the ICC. Some delegations argued during the drafting stages of the Rome Statute that the inclusion of corporations within the Court's jurisdiction would facilitate victims' compensation. Others cautioned that the evidentiary challenges of prosecuting legal entities, and many national legal systems' rejection of the criminal liability of corporations, made the exclusion of corporations from ICC jurisdiction more appropriate. Following the philosophy of the Nuremberg Tribunal that "international crimes are committed by men, not by abstract entities," article 25(1) of the Rome Statute ulimately limited the Court's jurisdiction to "natural persons." The OTP may prosecute corporate officers, managers, and employees, but not the corporate entity itself.

From Nuremberg to the *ad hoc* tribunals for the former Yugoslavia and Rwanda, international courts have found individual corporate officers, managers, and employees criminally responsible for war crimes, crimes against humanity, and genocide. Moreno Ocampo has recently made several statements indicating the OTP's interest in investigating the financial links to crimes committed in the Democratic Republic of Congo (DRC). In the OTP policy paper, Moreno Ocampo stated that "financial transactions … for the purchase of arms used in murder, may well provide evidence proving the commission of such atrocities."

At the September 2003 Assembly of States Parties, Moreno Ocampo announced that his office is closely following the situation in the Ituri district of the northeastern DRC, where massacres, rape, and forcible displacement routinely occur. While it is not certain that the first cases before the Court will be from the DRC, the chief prosecutor revealed that he is prepared to seek authorization from the Pre-Trial Chambers to begin an investigation of those responsible for the crimes committed there. He emphasized the possibility that those who direct operations in the extractive industries "may also be the authors of crimes, *even if they are based in other countries*" (emphasis added). Such statements, along with the broad prosecutorial discretion granted to the OTP, lead some to wonder how far the Court will go in pursuing military, political, and even corporate leaders.

The Test Case: Civil War and the Extractive Industries in DRC

MORE THAN THREE MILLION CIVILIANS have died in the DRC since 1998, making it the most devastating conflict to civilians since World War II. At least 5,000 civilians have died in the Ituri district alone since July 1, 2002, the effective date of the Court's temporal jurisdiction. Before the upsurge in violence in May 2003, the United Nations estimated that the violence in Ituri had internally displaced approximately 500,000 people, or ten percent of the area's population. On January 16, 2004, a massacre in Ituri left an estimated 100 dead, prompting the chief prosecutor to announce a few days later at the International Conference Against Genocide that he will select two cases from Ituri by mid-2004, and hopes to begin investigations by October. If this timeline proceeds as planned, trials could begin in 2005.

The root of the current conflict dates back to May 1997, when the Alliance of Democratic Forces for the Liberation of Congo, led by Laurent Kabila, overthrew the dictatorship of Mobutu Sese Seko. Rwanda and Uganda supported Kabila's uprising, but soon became concerned that his regime would not expel the Rwandan Hutu extremists hiding in eastern DRC after the Rwandan genocide. Uganda and Rwanda invaded the country in 1998 to destabilize the

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Kabila government, ostensibly to prevent a Hutu invasion of Rwanda and to protect ethnic Tutsis in the DRC. In the process, however, they heightened regional and tribal tensions, supported Congolese rebels, and strategically positioned themselves to exploit the DRC's coveted mineral resources. Angola, Zimbabwe, and Namibia sent troops to back Kabila. He managed to retain power until his assassination in January 2001, when his son Joseph was appointed to succeed him.

As the war continued, the DRC government maintained control of only the western half of the country, leaving the eastern DRC an occupied territory under the primary control of Uganda and its local proxies from 1998 to 2003. During that time, Uganda dramatically increased its exports of diamonds, gold, and coltan, a rare mineral used in cellular phones and laptop computers, from the rebel-held Congolese territory. The Ugandan army helped arm and train the approximately ten armed insurgent groups that currently exist in Ituri, instigating ethnic feuds between the Hema and Lendu militias to gain access to the region's vast mineral resources.

Under mounting international pressure, Rwanda and Uganda agreed in July and August 2002, respectively, to withdraw their troops from the eastern DRC. By mid-2003, most foreign troops had officially pulled out of the region, but the Ugandan Peoples' Defense Forces (UPDF) trained local paramilitary forces to protect the economic interests of the UPDF officers after their departure. The Rwandan Patriotic Army left in place certain officers from battalions specializing in mining activities to perform the same functions as apparent civilians. While their withdrawal was a positive development for the resolution of the conflict, the exiting powers left in their wake an intricate web of actors in a self-financing war economy.

The UN Panel of Experts for the DRC

In June 2000, the Security Council established a Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of Congo (Panel) to investigate the extent to which investment in the extractive industries fueled the war. In its October 2002 report, the Panel alleged that 85 companies were involved in business activities in the DRC that breache the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development (OECD). American, European, and South African corporations figure high on the list. The Panel also named specific Congolese and international businesspeople as well as high-ranking military officers and political officials from Uganda, the DRC, Zimbabwe, and Rwanda who were connected to illegal mining activities and arms trafficking. The violations include "theft, embezzlement, diversion of public funds, undervaluation of goods, smuggling, false invoicing, non-payment of taxes, kickbacks to public officials and bribery."

The Panel's 2002 report provoked strong reaction from the companies and countries it alleged were helping to perpetuate the war in the DRC. Western governments and business lobbies pressured the UN to excise a controversial section of the Panel's subsequent 2003 report that detailed the continued participation of military officials and businesses in the illegal export of minerals. The UN complied, voicing concerns that the information could endanger the DRC's transitional government. The 2003 report also states that cases against 48 of the companies have been resolved, while the rest of the cases are either pending or require further monitoring.

The 2002 report describes in great detail the way in which "elite networks" of political and military leaders, as well as businessmen and certain rebel leaders, cooperate to protect and exploit resources and generate revenue in areas controlled by the DRC government, Rwanda, and Uganda. By controlling the various armies and local security forces and carrying out select acts of violence, these elite networks monopolize the production, commerce, and financing involved in extracting diamonds, gold, copper, cobalt, and coltan. Rebel administrations in the occupied territories serve as fronts for these international operations, generating public revenue which is then diverted into network coffers.

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The elite network operating in the government-controlled area of the DRC is comprised of Congolese and Zimbabwean government officials and private businesspeople. This network transfers publicly owned mineral assets by way of secret contracts to joint ventures controlled by private companies, amounting to a multi-billion dollar corporate theft of the DRC's public assets. Officials in the Congolese government grant mining licenses and export permits to the companies in exchange for personal gain. The Congolese government then uses revenue from the sale of diamonds and other resources to purchase arms for the Congolese Armed Forces.

The Congo Desk of the Rwandan Patriotic Army (RPA) centrally manages the elite network in the Rwandan-controlled area of the DRC, linking the commercial and military activities of the RPA. A Panel source claims that income to the Congo Desk accounted for 80% of the RPA's revenues in 1999, thus facilitating Rwanda's continued commercial presence in the DRC. The RPA controls most of the coltan mining in the eastern DRC, does not pay taxes on the extracted mineral, and uses forced labor, reported-

ly including prisoners brought in from Rwanda who work as indentured servants. In the Ugandan-controlled area, the elite network is decentralized and loosely hierarchical. The Panel reported that the network generates revenue "from the export of primary materials, from controlling the import of consumables, [and] from theft and tax fraud." The UPDF have trained local militias, and the elite network has fostered ethnic tension by alternately favoring Hema and Lendu businessmen and politicians, leading to increased violence in the region.

Corporations could thus be implicated in, and found criminally liable for, a number of violations of international criminal law committed in the DRC. Such violations include subjecting local populations, including children, to forced labor in the extraction of natural resources; the torture, rape, and murder of thousands of civilians during military operations to secure mineral-rich land; and the destruction of agricultural infrastructure to force peasant farmers to participate in extractive work, resulting in reduced food supplies and slave-like conditions in the coltan mines.

Prosecution of Corporate Criminals Before the ICC

To the extent that corporate officers and managers play a role at all in the atrocities, they are more likely to remain behind the scenes, issuing secret orders, turning a blind eye to "efficient" business practices, or supplying the means to commit the crime. Under the Rome Statute, direct participation in the crime is not necessary to establish the criminal liability of corporate officers and managers. The OTP may invoke theories of "intermediary participation," such as command responsibility and accomplice liability, to hold them accountable for acts committed by others.

> "Under the Rome Statute, direct participation in the crime is not necessary to establish the criminal liability of corporate officers and managers."

Command or Superior Responsibility

Under the theory of command responsibility, an official commander, or one effectively acting as a commander, may be individually criminally responsible for failing to supervise properly and control the conduct of others acting under his or her effective authority and control. Articles 6(3) and 7(3) of the Statutes for the International Criminal Tribunals for Rwanda and the former Yugoslavia, respectively, provide for command responsibility, but they do not differentiate between military commanders and civilian superiors. In a controversial departure from that approach, the US delegation to Rome proposed distinct "state-of-mind" requirements for the liability of military commanders on the one hand and civilian superiors on the other. Examples of people who might fall under the category of civilian superiors are government officials, corporate officers and managers, and even teachers and leaders of social groups and churches. After much debate and compromise, the delegates adopted this distinction in article 28 of the Rome Statute.

Article 28(b) governs civilian superiors and imposes a much more rigorous test than does 28(a), which pertains to military commanders. A military commander may be criminally liable if he or she either knew or *should have known* of a subordinate's criminal activities and failed to take "all necessary and reasonable measures within his or her power to prevent or repress their commission" or to inform the competent authorities. In contrast, for the Court to hold civilian authorities criminally liable for their subordinates' conduct, article 28(b)(i) provides that the prosecutor must demonstrate that the superior "either knew, or *consciously disregarded* information which clearly indicated the subordinates were committing or about to commit" a crime (emphasis added). This more rigid state-of-mind requirement, akin to willful blindness, may be difficult to meet in most cases.

The prosecution must also establish a superior-subordinate relationship based on either *de jure* control, emanating from an official delegation of power, or *de facto* control. By definition, such a relationship does not exist among equals. It seems unlikely, therefore, that the Court will deem a corporate officer or manager the superior of his or her rebel trading partners or of fellow corporate actors with whom he or she designs and implements criminal plans. A superior-subordinate relationship may be established, however, if the clients are acting at the behest of the corporation when they commit the crime (e.g., while providing security for mining facilities or when carrying out orders to assassinate a company's union members). The prosecutor could establish such a relationship by showing that the subordinates who committed the crime were under the accused's actual and effective control when they acted.

It is not unprecedented for an international tribunal to find a corporate manager liable on the theory of superior responsibility. In *Prosecutor v. Musema*, the International Criminal Tribunal for Rwanda convicted the director of a tea factory and sentenced him to life imprisonment for acts of genocide and crimes against humanity that his employees perpetrated against Tutsi refugees. The Trial Chamber found that Musema exercised effective control over the employees of the tea factory, but it was not satisfied that he exercised such control over other groups of perpetrators, such as the *interahamwe* paramilitary forces and plantation workers. Thus, the standard for effective authority and control is high—it is not merely one's capacity to influence local armed groups that triggers superior responsibility, but rather actual and effective subordination stemming from an exercise of that influence. This will be easier to prove when a corporation directly employs the perpetrators.

Aiding and Abetting, or Accomplice Liability

Article 25 of the Rome Statute provides a less rigorous means of holding corporate war criminals accountable for acts committed by others. Unlike superior responsibility, aiding and abetting liability requires that the accused act knowingly. Because it does not require a superior-subordinate relationship, article 25 might be an appropriate mechanism for holding corporate actors accountable for transactions with suppliers whom they know procure raw materials by means of grave human rights abuses.

Section 3(a) of article 25 provides that a person can commit a crime "whether as an individual, jointly with another or through another person," and section 3(b) covers one who "orders, solicits, or induces" the commission or attempted commission of a crime. Section 3(c) establishes that a person will be individually responsible for a crime if that person "aids, abets, or otherwise assists in its commission or attempted commission, *including providing the means for its commission*" (emphasis added). A person could also be criminally liable under section 3(d) if he or she "in any other way contributes" to a crime or an attempted crime by a group of persons acting with a common purpose. That section further provides that such contributions can be made either with the aim of furthering the group's criminal activity or purpose, or *simply with the knowledge that the group intends to commit the crime*.

The Rome Statute does not specify what constitutes the provision of means to commit a crime and the forms of contribution for facilitating the commission of a crime required for aiding and abetting liability. In the *Zyklon B Case* (1946), the British Military Court convicted German industrialist Bruno Tesch, the owner of a company that supplied poison gas and corresponding equipment, for selling Zyklon B gas to the Nazi S.S., knowing that the S.S. was using it to kill allied nationals in concentration camps. By analogy, if a company operating in the DRC trades weapons for diamonds, the ICC might deem such weapons the means for the commission of a crime. However, if a corporation purchases diamonds from a rebel group or a state whose military uses the revenue to purchase arms for use against civilians, will the purchase money itself fall within the definition of "means of commission" or "contribution" to the crime? Or would the corporation have to pay more than fair market value for the commodities it purchases from known human rights violators for such payment to constitute a contribution? The Court will have to grapple with these and other complicated questions in 2004 as it begins to develop its own jurisprudence based on the cases it accepts from the DRC or other countries.

Conclusions and Recommendations

The intricate and extensively documented web of corporate involvement in the DRC's brutal conflict would make it an interesting test case for holding corporate officers and mangers accountable for the role they play in exacerbating civil conflicts. The chief prosecutor has been outspoken in his interest in investigating the financial transactions behind the war crimes in the DRC. The OTP already has a considerable amount of investigatory work from the UN Panel of Experts at its disposal if it decides to pursue leading international businesspeople in the Antwerp and New York diamond markets or high-tech companies that rely on Congolese cobalt. The imprisonment at The Hague of corporate executives would further the Court's goal of deterrence and motivate corporations to monitor more strictly their business activities in war-torn countries.

However, practical limitations might result in few, if any, prosecutions of corporate officers. States and corporations may simply refuse to cooperate with the OTP's requests for information or extradition of corporate officers. Moreover, the OTP is acutely aware that its work will be under the microscope of the international community and that the Court's legitimacy rests on avoiding charges of politicization. Thus, the OTP may decide to tread lightly on what surely will be controversial grounds and shy away from high-level prosecutions of corporate officers until the Court establishes a reputation of fairness and neutrality.

Given the high legal hurdles imposed by article 25(3) and, to a lesser extent, article 28(b), it might be difficult to successfully prosecute individuals on the grounds of corporate complicity or superior responsibility in the DRC and elsewhere in future cases. If the OTP moves forward with an investigation in the DRC, the Security Council should make available all of the information the UN Panel uncovered in its investigation of corporate involvement in the war. The cooperation of the international community, particularly the intelligence services and the attorneys general of African as well as European and American governments, will be essential in allowing the prosecutor to investigate the financial transactions that fuel the war. The referral of the DRC case by an African country would further strengthen the Court's legitimacy among developing countries. If the OTP begins investigating the DRC, human rights advocates in Africa and in countries with commercial links to the country should pressure their governments to cooperate fully with the investigation, as it will set an important precedent for the relationship between the Court and the international community.

In the DRC and elsewhere, NGOs and human rights advocates who seek to hold corporations accountable for their contributions to serious human rights abuses should focus their investigative work on the issues presented here and forward relevant information to the Office of the Prosecutor. The most critical information is that which helps establish the existence of a superior-subordinate relationship, the state of mind of corporate officers and managers, and the aiding and abetting of crimes. Activists from countries whose nationals and corporations the UN Panel has identified as having violated international human rights and humanitarian law principles while in the DRC should pressure those companies to adhere to the OECD Guidelines, while pressuring the governments where those companies are registered to investigate and take appropriate action against them. Activists in the United States should pressure their congressional representatives to strike the provisions of the American Servicemembers Protection Act of 2002 that prohibits the US government from cooperating with ICC investigations.

Finally, those countries concerned that the Court might exercise jurisdiction over their nationals doing business in the DRC should conduct thorough, transparent investigations and, if necessary, prosecute their own corporate officers. In this way, the principle of complementarity will serve to keep cases off the ICC's docket and ensure that corporate officers are brought to justice in their own countries. ***HRB***

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Corporate Liability under the Rome Statute

David Scheffer*

Can corporate perpetration of genocide, crimes against humanity, and war crimes (atrocity crimes) be investigated and prosecuted before the International Criminal Court (ICC)? The answer is conditionally affirmative with respect to corporate officers responsible for their company's criminal conduct. However, investigation and prosecution of corporations themselves as juridical persons would require complex amendments to the Rome Statute of the ICC.

Corporate officers are already subject to investigation and prosecution by the ICC because the Rome Statute confers personal jurisdiction only over natural persons, particularly if he or she is a national of a "State Party" to the Rome Statute. One corporate executive, Joshua Arap Sang,[1]—former head of operations and well-known radio personality of Kass FM in Nairobi, Kenya—recently faced prosecution at the ICC as an indirect co-perpetrator of three counts of crimes against humanity. He was charged with using coded messages in his radio broadcasts to commit murder, forcible transfer, and persecution. His prosecution was in connection with the larger situation being investigated in Kenya for the period between June 1, 2005 and November 26, 2009 and, in particular, the post-election violence of 2007-2008. However, the Trial Chamber vacated the charges against Sang on April 5, 2016.[2] Two judges, with a third dissenting, found that the Prosecutor had presented insufficient evidence, with one judge explaining that witness interference and political meddling were reasonably likely to intimidate witnesses.[3]

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[1] Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2012), https://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf.

[2] Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11, Public redacted version of Decision on Defence Applications for Judgments of Acquittal (Apr. 5, 2016), https://www.icc-cpi.int/en_menus/icc/situations and cases/situations/situation icc 0109/related cases/icc01090111/court records/chambers/tcVa/Pages/2027.aspx.

[3] Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11, Dissenting Opinion of Judge Herrera Carbuccia (Apr. 5, 2016), https://www.icc-cpi.int/en_menus/icc/situations and cases/situations/situation icc 0109/related cases/icc01090111/court records/chambers/tcVa/Pages/2027.aspx.

The ICC will entertain individual criminal responsibility[4] or superior responsibility[5] for corporate officers when their actions are part of an overall situation of atrocity crimes that either has been referred[6] to the Prosecutor by a State Party or the Security Council, or the Prosecutor has initiated an investigation,[7] approved by the Pre-Trial Chamber, of essentially a situation of atrocity crimes. This means that the isolated commission of, or complicity by, a corporation in genocide, crimes against humanity, war crimes, or even aggression[8] (once amendments relating to the crime of aggression are procedurally ratified and activated by a sufficient number of States Parties) will only subject corporate officers to ICC scrutiny if the alleged illegal conduct is part of a situation of atrocity crimes that has fallen under the jurisdiction of the Court by virtue of a proper referral or investigation. As of early 2016, this would entail corporate activity in one or more of the situations[9] currently under either official investigation by the Court (Democratic Republic of the Congo, Uganda, Central African Republic (two situations), Darfur (Sudan), Kenya, Libya, Côte d'Ivoire, Mali, and Georgia) or, for purposes of determining whether an investigation can be launched under the Prosecutor's *proprio motu* powers, preliminary examinations[10] by the Prosecutor of Afghanistan, Burundi, Colombia, Nigeria, Guinea, Iraq, Ukraine, and Palestine. Therefore, corporate officers need not fear ICC jurisdiction while conducting most global corporate activities unless such actions fall within the narrow parameters of a relatively small number of situations of atrocity crimes being officially investigated by the ICC at the time.

However, atrocity crimes arising as a consequence of corporate operations or complicity in government commission of atrocity crimes to facilitate corporate investments might trigger the jurisdiction of the ICC. Tough requirements of personal, territorial, temporal, and subject-matter jurisdiction requirements must still be met, particularly in the context of individual corporate officers who could be investigated and prosecuted, and the situation must also meet the gravity[11] threshold required to qualify for the ICC's attention.

It is certainly possible that in the future, a single atrocity crime of relatively limited magnitude, perhaps caused by corporate criminal conduct, may be a situation that merits ICC investigation. The Pre-Trial Chamber's decision of 16 July 2015[12] found factors militating in favor of sufficient gravity in the Israeli Defense Forces' singular attack on the

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[4] Rome Statute of the International Criminal Court, art. 25, July 17, 1998, 2187 U.N.T.S. 90.

[5] *Id.* at art. 28.

[6] *Id.* at art. 13.

[7] *Id.* at art. 15.

[8] Amendments to the Rome Statute of the International Criminal Court, art. 8 *bis* ¶ 1, June 11, 2010, A-38544 U.N.T.S.

[9] *All Situations*, INTERNATIONAL CRIMINAL COURT, https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/Pages/situations%20index.aspx

[10] *Id.*

[11] International Criminal Court, *Policy Paper on Case Selection and Prioritisation*, (Feb. 29, 2016), https://www.icc-cpi.int/iccdocs/otp/29.02.16_Draft_Policy-Paper-on-Case-Selection-and-Prioritisation_ENG.pdf#search=gravity requirements.

[12] Situation on the Registered Vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia, ICC-01/13, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation (Jul. 16, 2015), https://www.icc-cpi.int/iccdocs/doc/doc2015869.pdf.

Mavi Marmara (a Comoros-registered vessel) bound for the Gaza Strip on 31 May 2010, and thus requested the ICC Prosecutor to reconsider her Decision Not to Investigate.[13]

The Article 98(2)[14] non-surrender agreements negotiated and concluded by the United States with over 100 governments prior to 2009,[15] exclusively by the George W. Bush Administration, seek to protect any U.S. national from surrender to the ICC for the purposes of standing trial; facially, these agreements would seem to include corporate officers of U.S. citizenship.[16] As the chief U.S. negotiator of the Rome Statute, I was deeply involved in the negotiation and drafting of Article 98(2), a provision that was originally intended to preserve the rights accorded under status of forces agreements.[17] In their current formulation, the agreements negotiated by the George W. Bush Administration overreach the original intent[18] of Article 98(2), which is that these bilateral agreements would protect only government personnel such as military, diplomatic, and government-employed humanitarian employees, of the "sending State."[19] The term "sending State" is well understood in treaty law to exclude private actors. In negotiating that provision of the Rome Statute, neither U.S. nor other negotiators had any intent to insulate private corporate officials.

If a government argues that it cannot surrender a corporate executive of U.S. citizenship who is in its custody and has been charged by the ICC because such government must comply with its Article 98(2) obligations with the United States, the ICC judges could sever the wording of the Article 98(2) agreements that purports to exclude a "national" of strictly private character from the government's obligation to surrender such individual under the Rome Statute. Alternatively, the judges could nullify the entire agreement for the purpose of Article 98(2) protection before the ICC. The obligation to surrender would arise where the government detaining a corporate officer subject to an ICC arrest warrant is either a state party with treaty obligations to cooperate or a non-party state directed to cooperate pursuant to a Security Council referral of a situation to the Prosecutor.

If it were better understood as a risk in corporate circles, the potential exposure of corporate officers to ICC jurisdiction could significantly influence the conduct of multinational corporations in situations of atrocity crimes under investigation by the Prosecutor. But that exercise needs to begin in university instruction and graduate business schools where the future leaders of multinational corporations are educated and trained.

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[13] Situation on the Registered Vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia, ICC-01/13-6-AnxA, Article 53(1) Report (Nov. 6, 2014), http://www.legal-tools.org/uploads/ tx_ltpdb/doc1913979_05.pdf.

[14] Rome Statute of the International Criminal Court, *supra* note 4, at art. 98(1).

[15] Bilateral Immunity Agreement Campaign, American Non-Governmental Organizations Coalition for the International Criminal Court, http://www.amicc.org/usicc/biacampaign.

[16] The 2002 non-surrender agreement between the United States and Afghanistan has typical language reading, "For purposes of this agreement, 'persons' are current or former Government officials, employees (including contractors), or military personnel or nationals of one Party." See BETH VAN SCHAACK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT: CASES AND MATERIALS, 171 (3rd ed. 2015).

[17] INTERNATIONAL SECURITY ADVISORY BOARD, FINAL REPORT OF THE INTERNATIONAL SECURITY ADVISORY BOARD (ISAB) ON STATUS OF FORCE AGREEMENTS (2015).

[18] DAVID SCHEFFER, ARTICLE 98(2) OF THE ROME STATUTE: AMERICA'S ORIGINAL INTENT 344-50 (2005).

[19] *Id.* at 333.

The larger question, though, looms: why not authorize the ICC to pursue criminal charges directly against corporations as juridical persons? This option was considered and rejected during the U.N. talks leading to the Rome Statute in July 1998.[20] I have written extensively in other publications[21] and *amicus curiae* briefs[22] about the reasons for the exclusion of criminal liability for juridical persons from the Rome Statute.[23] In brief, as the court was originally designed to hold natural persons accountable for atrocity crimes, there was too little time to fully consider the proposal. Also, at that time, there were an insufficient number of national jurisdictions that held corporations liable under criminal law, as opposed to civil tort liability, which has long been universal. The principle of complementarity under the Rome Statute,[24] a principle dependent on compatible criminal law in state party jurisdictions, would have been crippled as a consequence. Finally, the proposal would have imperiled the ratification of the treaty by many governments given the novelty of corporate exposure to criminal liability before the ICC.

Today, the global landscape regarding corporate criminal liability in national jurisdictions has changed,[25] including in many of the States Parties to the Rome Statute. Theoretically, the exercise of complementarity, while still problematic in some jurisdictions, will become more plausible in the event the Rome Statute is amended to embrace corporate liability and a significant number of States Parties transform their own national criminal codes to cover juridical persons in the commission of, or complicity in, atrocity crimes.

Obtaining approval for amendments to the Rome Statute that would extend the ICC's jurisdiction over juridical persons would be extremely difficult to achieve diplomatically. Nations with economies that are fueled by multinational corporations, either as home states or host states, would likely oppose efforts to expose these companies to criminal liability before the ICC. The potential economic cost of a finding of corporate criminal liability, or even the possibility of an ICC investigation in the future, could have devastating impacts on a nation's economy.

Nonetheless, there is value in contemplating the possible phrasing of an amendment to the Rome Statute intended to extend the Court's personal jurisdiction over juridical persons. Article 25(1)[26] could be amended to read: "The Court shall have jurisdiction over natural *and juridical persons* pursuant to this Statute" (new wording in italics). For good

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[20] Per Saland, *International Criminal Law Principles*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 189, 100 (Roy Lee ed., 1999).

[21] David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKLEY J. OF INT'L L. 334 (2011).

[22] Supplemental Brief of Ambassador David J. Scheffer, Northwestern University School of Law, as Amicus Curiae in Support of the Petitioners, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491).

[23] DAVID SCHEFFER, ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS 203 (2012).

[24] WILLIAM SCHABAS, INTERNATIONAL CRIMINAL COURT 190-199 (4th ed. 2011).

[25] Supplemental Brief of Ambassador David J. Scheffer, *supra* note 22, at 13-26.

[26] Rome Statute of the International Criminal Court, *supra* note 4, at art. 25(1).

measure, the second sentence of Article 1[27] could be amended to read: "It shall be a permanent institution and shall have the power to exercise its jurisdiction over *natural and juridical persons* for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. *Any use of 'person' or 'persons' or the 'accused' in this Statute shall mean a natural or juridical person unless the text connotes an exclusive usage.*" (new wording in italics)

Beyond those two amendments, careful consideration would have to be made to distinguish, if necessary, between natural and juridical persons for purposes of production of evidence, the exercise of due process rights, proper physical presence of the defendant (which natural person would appear on behalf of the corporation) in relevant proceedings, state cooperation requirements unique to corporations, and discerning which penalties are available and enforceable against corporations in the event of a guilty judgment. Any group of amendments covering juridical persons in the Rome Statute would require approval by two-thirds of the States Parties pursuant to Article 121(3)[28] and, if that hurdle is passed, then such amendments would have to be ratified or accepted by seven-eighths of the States Parties in order to come into force pursuant to Article 121(4).[29]

It might be possible to avoid these stringent amendment requirements by negotiating a protocol to the Rome Statute that would permit States Parties that ratify or accept it to "opt in" to coverage of juridical persons. However, such a protocol may be very difficult to negotiate as it would still have to transform the Rome Statute radically to cover juridical persons only for those States Parties ratifying or accepting the protocol. The protocol itself would have to largely mirror the complex amendments required for a comprehensive overhaul of the Rome Statute described above, and may still need to be initially adopted by two-thirds of the States Parties pursuant to Article 121(3).

Corporate accountability for atrocity crimes may be more pragmatically accomplished through 1) the investigation of corporate officers under existing Rome Statute powers where the ICC is exercising jurisdiction over a relevant situation, and 2) the further development of national criminal codes covering corporate commission of, or complicity in, atrocity crimes. Governments that have modernized their criminal codes to include corporate accountability for atrocity crimes may one day find it useful to create a treaty-based multilateral tribunal on atrocity crimes with clear jurisdiction to adjudicate criminal complaints, and perhaps also civil claims, against juridical persons. If they choose to rebuild the ICC as the international forum in which to adjudicate such corporate crimes, then the tribunal carpentry required to indict corporations may prove quite daunting to master.

[27] *Id.* at art. 1.
[28] *Id.* at art. 121(3).
[29] *Id.* at art. 121(4).

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Move fast and break societies: the weaponisation of social media and options for accountability under international criminal law

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This article considers the application of international criminal law to the role of social media entities in fuelling atrocity crimes, and the legal theories that could be most valuable in fostering their accountability. While incitement of atrocity crimes is one way of framing social media's role in fomenting conflict, this paper argues that it may be more productive to conceptualise social media's role in atrocity crimes through the lens of complicity, drawing inspiration not from the media cases in international criminal law jurisprudence, but rather by evaluating the use of social media as a weapon, which, under certain circumstances, ought to face accountability under international criminal law.

Keywords: *social media, corporate complicity, atrocity crimes, crimes against humanity, genocide, corporate liability, aiding and abetting*

1 INTRODUCTION

> *'Over a very short period of time, a handful of tech geeks have become among the most powerful figures in all of politics and war.'*
>
> P.W. Singer

In 2015, a warning was delivered to Facebook officials at its headquarters in Menlo Park, California: there was a distinct risk that, in Myanmar, Facebook was at risk of becoming what hate radio was to Rwanda in the days preceding the 1994 genocide.[1] As has now been widely reported, hundreds of Myanmar's military officials engaged in a massive disinformation and propaganda campaign to support ethnic cleansing against the Rohingya, distributing photos of corpses from faux massacres, sharing

* Email: shannonraj@gmail.com. The views expressed herein are those of the author and do not necessarily reflect the views of the STL. The core arguments of this paper were presented and refined at both the 2019 Cambridge International Law Conference and the 2019 RightsCon Summit in Tunisia. The author would like to thank the participants of those conferences, in particular Barrie Sanders, for their valuable and thought-provoking discussions.

1. Patrice Taddonio, 'As Facebook Addresses Role in Myanmar Violence, a Look Back at Early Warnings', Frontline (Boston, 6 November 2018) <https://www.pbs.org/wgbh/frontline/article/as-facebook-addresses-role-in-myanmar-violence-look-back-at-early-warnings/> accessed 8 February 2019.

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fabricated stories of rape, and using troll accounts to flood social media with hate.[2] One can hardly fail to see, asserted one journalist, the parallels between the use of social media in Myanmar and that of radio in Rwanda to incite mob violence.[3]

The analogy has been drawn repeatedly as information comes to light about the role that social media has played in inciting hatred, sowing division and fostering ethnic conflict in societies around the world. In legal circles, the possibility of holding social media accountable for hate speech and incitement to atrocity crimes has become a topic *du jour*.

But to what extent is social media's role in atrocity crimes really analogous to that of news entities such as radio, newspapers and other traditional media sources? Neither Facebook, Instagram, Twitter nor any other leading social media platforms posit themselves as media entities: indeed, in his recent testimony before the United States Congress, Mark Zuckerberg acknowledged that Facebook has some responsibility for the content posted on its platform, but refuted the notion that Facebook is a 'media company', stating that he considers it a 'technology company, because [he said that] the primary thing that we do is have engineers who write code and build product[s] and services for other people'.[4] The difference is not semantic: the mission, platform and features of Facebook, along with those of most other leading social media platforms, bear significant distinctions from the mission, role and features of traditional news media entities.[5]

In a reflection of the interplay between the use of new technologies and international law, this article considers the application of international criminal law to the role of social media entities in fuelling atrocity crimes, and the legal theories that could be most valuable in fostering their accountability. While incitement of atrocity crimes is one way of framing social media's role in fomenting conflict, this paper argues that it may be more productive to conceptualise social media's role in atrocity

2. Paul Mozer, 'A Genocide Incited on Facebook, with Posts from Myanmar's Military', The New York Times (Naypyidaw, 15 October 2018) <https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html> accessed 8 February 2019.

3. Ashley Starr Kinseth, 'What's Happening in Myanmar is Genocide', Al Jazeera (18 October 2017) <https://www.aljazeera.com/indepth/opinion/happening-myanmar-genocide-171016114145271.html> accessed 1 February 2019.

4. Michelle Castillo, 'Zuckerberg Tells Congress Facebook is Not a Media Company: "I Consider Us to be a Technology Company"', CNBC (11 April 2018) <https://www.cnbc.com/2018/04/11/mark-zuckerberg-facebook-is-a-technology-company-not-media-company.html> accessed 10 February 2019.

5. While traditional media entities profess a 'commitment to the truth', the same cannot be said for today's social media platforms, which decidedly have other aims. See eg The New York Times, 'Mission and Values', The New York Times <https://www.nytco.com/company/mission-and-values/> accessed 26 July 2019; Washington Post Staff, 'Policies and Standards', The Washington Post (1 January 2016) <https://www.washingtonpost.com/policies-and-standards/?utm_term=.0af73ebdc023#factchecking> accessed 26 July 2019; the BBC, 'Mission, Values and Public Purposes', BBC <https://www.bbc.com/aboutthebbc/governance/mission> accessed 26 July 2019. Further, and as pointed out by Dr Emma Irving, unlike RTLM, there is no indication that Facebook itself is generating hateful content. Janet Anderson, 'Liking Genocide on Facebook', Justice Info (The Hague, 4 February 2019) <https://www.justiceinfo.net/en/other/40164-liking-genocide-on-facebook-myanmar-rohingya.html> accessed 10 February 2019. To date, Facebook has consistently refuted the notion that it is a media entity. The author understands, however, that the platform recently announced its intention to launch a dedicated news section in the future. This article premises its accountability analysis on the platform's features in operation at the time of writing; to the extent that future features stand to alter Facebook's accountability under international law, this possibility will be explored in a future publication.

crimes through the lens of complicity, drawing inspiration not from the media cases in international criminal law jurisprudence, but by evaluating the use of social media as a weapon, which, under certain circumstances, ought to face accountability under international criminal law.

2 PLATFORMS FOR HATE: THE PROSECUTION OF MEDIA FOR INCITEMENT AND HATE SPEECH

A number of scholars have outlined the now familiar lineage of international criminal cases on the use of media in relation to direct and public incitement and hate speech.[6] This lineage is commonly understood to have begun in 1946, when the Nuremberg Tribunal convicted a Nazi publisher for his role in spreading anti-Semitic propaganda.[7] It continued in December 2003, when the International Criminal Tribunal for Rwanda (ICTR) convicted three media executives for their role in inciting genocide in 1994.[8] Like the use of social media today, these individuals were convicted because they provided platforms for the virulent spread of hate, which went on to contribute to mass atrocities under international law.

Yet these cases bear significant distinctions from the use of social media in conflicts today. Indeed, in each of these cases, the publishers of the hateful speech themselves shared an intent and desire for the atrocities to occur. In the *Nahimana et al.* case before the ICTR, the Trial Chamber observed that not only was genocidal intent evident from the broadcasts of Radio Télévision Libre des Mille Collines (RTLM), but also from individual statements made by the accused.[9] Similarly, Julius Streicher was noted to have not only been the publisher of *Der Stürmer*, an anti-Semitic weekly newspaper, but to have personally been a staunch Nazi and supporter of Hitler's agenda.[10] Certainly, this can be distinguished from most of today's social media platforms, where it cannot be seriously maintained, for example, that Facebook or its top executives specifically intended for the Rohingya to be exterminated. The more realistic case to be made, based on the evidence that has surfaced to date, is that they were aware of the nefarious uses of their platform and refused to meaningfully intercede.

3 UNDERSTANDING SOCIAL MEDIA ENTITIES AS WEAPONS SUPPLIERS UNDER INTERNATIONAL CRIMINAL LAW

3.1 The complicity of weapons suppliers in international criminal law jurisprudence

It is, perhaps, more useful to examine the role of social media from another angle entirely. Rather than comparing social media platforms to traditional media entities – a less than

6. See eg Richard Ashby Wilson, 'Propaganda and History in International Criminal Trials' (2016) 14 JICJ 519; Wibke Kristin Timmerman, 'Incitement in International Criminal Law' (2006) 88 International Review of the Red Cross 864, 823.
7. *Judgment of the Nuremberg International Military Tribunal* (1947) 41 AJIL 172, 293–296 (Nuremberg Judgment).
8. ICTR, *Prosecutor v Ferdinand Nahimana et al* ICTR-99-52-T, Judgment and Sentence, 3 December 2003 ('ICTR Media Case').
9. Ibid para 965.
10. *Nuremberg Judgment* (n 7) 294.

perfect fit – and arguing that they contribute to the incitement of hate speech, this paper proposes another analogy. A *weapon* is commonly understood to be either 'an instrument used in fighting' or 'an instrument of offensive or defensive combat'.[11] While this paper makes no submission that social media is a weapon *per se*, it posits that the analogy to weapons may be of value in attempting to understand how the contours of international criminal law (ICL) may best be applied to its use.

Traditionally, arms suppliers in international criminal jurisprudence have been charged and convicted under a legal theory of complicity. Specifically, they are generally charged with aiding and abetting the atrocity crimes perpetrated.

Under customary international law, aiding and abetting has been defined as follows: '[t]he *actus reus* consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The *mens rea* required is the knowledge that these acts assist the commission of the offence'.[12]

Following the definition set out in customary international law, under the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL), the aider and abettor need not share the intent of the principal perpetrator.[13] Rather, the aider and abettor need only be aware that his acts assist in the commission of the crime and be aware of the essential elements of the crime committed.[14] In fact, the aider and abettor need not even know the exact crime intended, as long as he or she is aware that one of a number of crimes is likely to be committed.[15]

The fact that the *mens rea* required for aiding and abetting requires only knowledge of the crime, rather than an intent to see it committed, has been of particular value in prosecuting those who have supplied weapons to the perpetrators of atrocity crimes at the international courts and tribunals. One of the earliest such cases was brought at the British Military Court in Hamburg against the suppliers of Zyklon B poison gas, used

11. Black's Law Dictionary Free Online Legal Dictionary, 'Weapon' <https://thelawdictionary.org/weapon/> accessed 29 July 2019.

12. See eg *Prosecutor v Furundžija* (Judgment) IT-95-17/1 (10 December 1998) para 249; *Prosecutor v Šainović* (Judgment) ICTY-05-87-A (23 January 2014) (Šainović Appeal Judgment) para 1649; *Prosecutor v Taylor* (Judgment) SCSL-03-01-A (26 September 2013) (Taylor Judgment) paras 436, 437, 481. It should be noted that the *mens rea* required under the Rome Statute differs. As explained by Héctor Olásolo and Enrique Carnero Rojo, an 'aider and abettor under the ICC Statute must have a purposeful will to bring about the crime (direct intent/*dolus directus* in the first degree), or at least the will to assist in the commission of the crime … [which] marks an important difference with the case law of the ad hoc and hybrid tribunals on aiding and abetting'; see Héctor Olásolo and Enrique Carnero Rojo, 'Forms of Accessorial Liability under Article 25(3)(b) and (c)' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP, Oxford 2015) 484–486. See also Norman Farrell, 'Attributing Criminal Liability to Corporate Actors' (2010) 8 JICJ 873, 882.

13. See eg Farrell (n 12) 882; *Taylor Judgment* (n 12) para 436 ('The Appeals Chamber's review of the post-Second World War jurisprudence demonstrates that under customary international law, an accused's knowledge of the consequences of his acts or conduct – that is, an accused's "knowing participation" in the crimes – is a culpable *mens rea* standard for individual criminal liability … . Whether this standard is termed "knowledge", "general intent", "*dol special*", "*dolo diretto*" or "*dolus directus* in the second degree", the concept is the same'); *Prosecutor v Tadić* (Judgment) ICTY-94-1-A (15 July 1999) (Tadić Appeals Judgement) para 229. See also *Prosecutor v Semanza* (Judgment) ICTR-97-20-T (15 May 2003) (Semanza Judgment) paras 431–433, 531.

14. Farrell (n 12) 882.

15. Ibid.

for mass murder at the Nazi concentration camps.[16] Despite a lack of direct evidence of the defendant's knowledge as to the way the gas was being used, the Court nevertheless found that such knowledge could be inferred.[17]

Similar principles were espoused in the case against Charles Taylor, the former President of Liberia, who was charged with aiding and abetting the atrocity crimes committed by the Revolutionary United Front (RUF)/Armed Forces Revolutionary Council (AFRC), in particular by providing them with weapons and other material support. In its judgment, the SCSL Appeals Chamber emphasised that whether an accused's acts and conduct had a substantial effect on the commission of the crime must be assessed on a case-by-case basis. It noted that 'aiding and abetting' conduct could take the form of providing weapons and ammunition, providing financial support, implementing a media campaign to arouse hatred, or could even be premised on the conduct of an accountant, architect or dentist acting in their respective professional roles.[18] It underscored that whether the conduct had a substantial effect on the commission of the crime could not be defined at the outset, but was rather a determination to be made in light of the evidence as a whole.[19] The Appeals Chamber upheld Taylor's conviction on the grounds that he had provided material support, including weapons, to the RUF/AFRC, while aware of the crimes it was committing and its operational strategy – which was, namely, to achieve political and military goals through a campaign of crimes directed against the civilian population.[20]

Similarly, in the case against Vladimir Lazarević at the ICTY, the Trial Chamber convicted him of aiding and abetting the crimes against humanity of deportation and forcible transfer committed by the Yugoslav Army (VJ) and the Serbian Interior Ministry (MUP) in Kosovo in the spring of 1999.[21] Despite being aware of the 'campaign of terror, violence, and forcible displacement being carried out by VJ and MUP forces against Kosovo Albanians', Lazarević was found to have provided practical assistance, encouragement and moral support to VJ forces, including through the provision of weaponry.[22] In upholding his conviction, the Appeals Chamber held that there was 'no error in the Trial Chamber's conclusion that Lazarević's role in the provision of weaponry rendered practical assistance to the commission of crimes by the VJ forces', and could constitute aiding and abetting when combined with the 'awareness that the crimes of deportation and forcible transfer were being committed by the troops'.[23]

3.2 Revising the analogy: comparing social media to weapons suppliers rather than media entities

The lessons that can be derived from the cases regarding weapons suppliers at the international tribunals may be of value when seeking avenues for accountability of social media entities. Indeed, in recalling how the provision of formal weaponry has

16. *The Zyklon B Case* (Judgment), Case No 9 at the British Military Court, Hamburg (1–8 March 1946) (Zyklon B Case).
17. Ibid paras 101–102.
18. *Taylor Judgment* (n 12) paras 369–370.
19. Ibid paras 369–370, 475.
20. Ibid paras 302, 445.
21. *Šainović Appeal Judgment* (n 12) para 1608.
22. *Prosecutor v Šainović* (Judgment) ICTY-05-87-T (26 February 2009) paras 924–927.
23. *Šainović Appeal Judgment* (n 12) para 1663.

constituted complicity in atrocity crimes, it appears likely that the weaponisation of social media could also, under certain circumstances, meet the elements of the crime.

Practically speaking, there are a number of aspects of social media which make the analogy to jurisprudence focused on traditional weapons suppliers particularly apt. As detailed above, the 'knowledge' intent requirement for aiding and abetting, as applied by the *ad hoc* tribunals, is a critical advantage in evaluating the use of social media through the lens of complicity. The lucrative aspect of both arms deals and social media means that the intent at issue is somewhat unique: while the actors may have knowledge of the end use of their products, their immediate intent is likely profit as a result of engagement with their services. This, of course, makes the conduct particularly well suited to the intent requirement for complicity.

By contrast, the intent required for joint criminal enterprise, another mode of liability, is that the accused 'act in pursuit of a shared criminal objective and must share the direct intent for crimes falling within that objective'.[24] While this intent can be relevant to the corporate context, it would rarely be of use in atrocity crimes by social media entities, which are generally far removed from the site of atrocity crimes and disinterested in their commission. The same could be said for arms suppliers, which, despite selling weapons to a government or militia, 'may not in fact share an objective to commit those crimes with members of the government or the militia, and may not have the direct intent to commit those crimes'.[25]

Certainly, it cannot be said that social media entities are always or even generally aware of their role in atrocity crimes. And yet it appears that, in a number of recent instances, that precise awareness can be demonstrated by the evidence. In Myanmar, for example, reports indicate that Facebook had 'plenty of early warnings from Myanmar and other countries about how it was being used to shape events on the ground'.[26] Indeed, a number of individuals describe specific meetings held with the company to articulate the serious problems that had developed with hate speech and disinformation on the platform in Myanmar, and the possibility of consequences on the ground.[27] According to one report, Facebook's 'sprawling bureaucracy and its excitement over the potential of the Myanmar market appeared to override concerns about the proliferation of hate speech'.[28] It is suggested that the application of aiding and abetting liability pursuant to principles of ICL may, for future scenarios, contribute to altering that calculation.

And what of the 'weapon' that social media presents? To those who would classify social media platforms as innocuous or neutral forms of technology, to be distinguished from those tools which, by their very design, endanger communities, the evidence here is perhaps more mixed than one might imagine. In this regard, it is notable

24. Farrell (n 12) 878; *Taylor Judgment* (n 12) para 382.
25. Farrell (n 12) 880. Farrell further points out that, even if the corporate actor does share that intent, it may be difficult to establish that as a matter of evidence.
26. Taddonio (n 1); Timothy McLaughlin, 'How Facebook's Rise Fueled Chaos and Confusion in Myanmar', Wired (6 July 2018) <https://www.wired.com/story/how-facebooks-rise-fueled-chaos-and-confusion-in-myanmar/> accessed 23 May 2019; Steve Stecklow, 'Why Facebook is Losing the War on Hate Speech in Myanmar', Reuters (Yangon, 15 August 2018) <https://www.reuters.com/investigates/special-report/myanmar-facebook-hate/> accessed 23 May 2019.
27. Taddonio (n 1); McLaughlin (n 26); Stecklow (n 26).
28. McLaughlin (n 26).

that many social media platforms today are not passive streams of content submitted by users, but specifically target certain content towards certain demographics in order to procure greater user engagement with the platform.[29] A number of reports and studies have detailed how social media platforms serve to drive extremism through algorithms developed to target primal negative human emotions – rendering the platforms particularly loaded 'weapons'.[30]

In exploring the other benefits of viewing social media entities through the same lens as traditional weapons suppliers, a number of other similarities serve to further the analogy. For example, the jurisprudence on the role of arms suppliers in atrocity crimes confirms that complicity does not require physical proximity to the crime; rather, acts of aiding and abetting can occur at a time and place removed from the actual crime.[31] In the realm of social media, where the click of a keyboard can have immediate ramifications thousands of miles away, the potential for accountability without physical presence at the site of the crime is a particularly valuable feature of complicity jurisprudence.

Third, both traditional weapons suppliers and social media platforms may be particularly incentivised to alter their behaviour by the application of ICL to their conduct; the deterrent aspect of the law may indeed be especially effective as applied to these actors. As one commentator remarked in regard to arms suppliers, and which is equally applicable to social media platforms, '[w]hile the average perpetrator of international crimes, whether imbued with ideological fervour or forced by the circumstances to participate in crimes, will perhaps be uninfluenced by the possibility of trial and punishment, the calculating businessman will probably incorporate the prospect of criminal prosecution into his cost-benefit analysis'.[32] It is certainly the hope that exploring avenues for accountability of social media entities under principles of ICL would have a similarly deterrent effect.

Finally, the application of ICL to both traditional weapons suppliers and social media platforms may be especially effective in light of the fact that non-legal attempts to obstruct these actors' conduct are likely to be both highly politicised and ineffective. Just as arms embargos are often inconsistently applied and enforced – and easily evaded – so too are social media's attempts to ban 'dangerous individuals and groups' from the platforms often ineffective at best, and

29. See eg Emma Irving, '"The Role of Social Media is Significant": Facebook and the Fact Finding Mission on Myanmar', OpinioJuris (7 September 2018) <http://opiniojuris.org/2018/09/07/the-role-of-social-media-is-significant-facebook-and-the-fact-finding-mission-on-myanmar/> accessed 4 May 2019 (noting that studies indicate that Facebook posts 'drawing on negative, primal emotions such as anger, fear and tribalism perform better on the platform and are made more visible' and that the platform makes 'ordinary individuals more prone to xenophobic violence'). Dr Irving further notes that 'if you build your algorithms in such a way that it promotes hateful content and inciteful content to the top of someone's news feed, you're doing more than being just a neutral hosting platform'. See also Anderson (n 5).

30. Max Fisher and Amanda Taub, 'How Everyday Social Media Users Become Real-World Extremists', The New York Times (25 April 2018) <https://www.nytimes.com/2018/04/25/world/asia/facebook-extremism.html> accessed 5 May 2019.

31. See eg *Taylor Judgment* (n 12) para 480 ('[t]his Appeals Chamber has previously held, consistent with the holdings of all other appellate chambers, that acts of aiding and abetting can be made at a time and place removed from the actual crime') (internal quotation omitted).

32. Harmen van der Wilt, 'Genocide v. War Crimes in the Van Anraat Appeal' (2008) 6 JICJ 557, 567.

counterproductive at worst.[33] In both arenas, private actors have largely operated free from meaningful regulation.[34]

While there is a case to be made for pursuing accountability of the senior executives and officers at social media platforms, a growing body of literature has also reflected on the movement towards liability for corporations themselves as legal persons. Indeed, although jurisdictional challenges at the international level remain daunting, more than a decade ago an expert panel of the International Commission of Jurists remarked that, in its view, 'there are no insurmountable conceptual obstacles to imposing criminal liability on businesses as legal entities', and observed that 'increasing numbers of jurisdictions are applying criminal law to companies'.[35] Thus, while the prosecution of legal persons is, at present, not possible before the International Criminal Court, there is nevertheless a possibility of future liability for legal persons in both domestic and international fora.[36]

4 NORMATIVE CONSIDERATIONS IN EXTENDING AIDING AND ABETTING LIABILITY TO SOCIAL MEDIA ENTITIES

4.1 Social media and the dual-purpose assistance dilemma

Even assuming, however, that social media entities can be held accountable for their actions under principles of ICL – and that a jurisdiction existed in which prosecution was possible – significant questions remain as to whether such accountability is appropriate. Although social media platforms have played significant roles in fuelling recent atrocity crimes, it cannot be discounted that these platforms also offer immeasurable benefits to people around the world, including citizens in the midst of conflict zones and humanitarian crises. Among other things, these platforms offer unique abilities to unify affected groups, share resources and information, and collect evidence of

33. See Alexandra Boivin, 'Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons' (2005) 87 International Review of the Red Cross 467, 478 ('[f]or political reasons, arms embargoes do not follow a consistent pattern of imposition and when they are pronounced, considerable difficulties plague their implementation and enforcement').
34. Ibid 484.
35. International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, 'Corporate Complicity and Legal Accountability' (International Commission of Jurists 2008) 58 <https://www.icj.org/wp-content/uploads/2012/06/Vol.2-Corporate-legal-accountability-thematic-report-2008.pdf> accessed 15 February 2019.
36. See Alexandra Garcia, 'Corporate Liability for International Crimes: A Matter of Legal Policy Since Nuremberg' (2015) 24 Tulane Journal of International and Comparative Law 97, 125, 128 (noting that the 'current trend towards the recognition of corporate criminal liability among jurisdictions from all continents and legal traditions, reinforced by initiatives undertaken at the international level, arguably provides evidence of the emergency of "a general practice accepted as law"'). See also, *In the Case Against Akhbar Beirut S.A.L et al* (Judgment) STL-14-06/T/CJ (15 July 2016); *In the Case Against Akhbar Beirut S.A.L. et al* (Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings) STL-14-06/PT/AP/AR126.1 (23 January 2015); Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (adopted June 2014) (Malabo Protocol); UNGA International Law Commission 71st Session, 'Crimes against humanity: Texts and titles of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee on second reading' (15 May 2019) A/CN.4/L.935, art 6(8).

atrocity crimes for use in prosecutions and investigations. It is therefore essential that, rather than painting the conduct of social media entities with too broad a brush, we develop appropriate parameters for the application of ICL to this new, emerging set of actors – or we risk negatively impacting the populations we intend to protect.

Indeed, social media platforms should be regarded as a prime example of 'dual-purpose assistance cases' – scenarios in which the assistance or 'contribution' provided by an entity can be used towards either lawful or unlawful activities – in other words, for good or for evil.[37] As described by Sabine Michalowski, overbroad criminalisation of dual-purpose assistance runs a risk that, despite criminalising contributions towards atrocity crimes, we also criminalise conduct with social value, as there might be 'perfectly legitimate reasons for supplying governments, even those with the worst human rights records, with certain goods and services, such as to enable them to carry out governmental tasks that clearly benefit the population …'.[38]

While some courts have attempted to set forth bright-line rules for determining how to handle dual-purpose assistance cases, others have urged a case-by-case approach. This is what was counselled by the Appeals Chamber at the Special Court for Sierra Leone in the *Taylor* trial, which observed that 'perfectly innocuous items', such as satellite phones, can be used to assist the commission of atrocity crimes, while instruments of violence can be used lawfully.[39] The distinction between criminal and non-criminal acts of assistance, it held, 'is not drawn on the basis of the act in the abstract, but on its effect in fact'.[40]

By contrast, another line of cases has required that acts be specifically directed towards the commission of the crime. In the case against Momčilo Perišić at the ICTY, the former Chief of General Staff of the Yugoslav Army (VJ) was charged with aiding and abetting atrocity crimes committed in Sarajevo and Srebrenica, in particular by providing 'extensive logistical assistance to the VRS [the army of the Republika Srpska]', including weapons and ammunition.[41] In its judgment, the Trial Chamber found that Perišić was aware of the VRS's propensity to commit crimes and was aware that similar crimes would probably occur, including the killing and wounding of civilians, but nevertheless continued to provide assistance.[42] Further, it found that Perišić was aware of the essential elements of these crimes, including the mental state of the perpetrators, and knew his conduct assisted in their commission.[43] As a result, it held that Perišić was guilty of aiding and abetting crimes against humanity and violations of the laws and customs of war.[44] The Appeals Chamber, however, reversed the conviction and ordered Perišić's release, holding that it had not been established that Perišić's assistance was specifically directed at criminal activities as opposed to the VRS's legitimate war efforts.[45] Diverging from other jurisprudence

37. Sabine Michalowski, 'Doing Business with a Bad Actor: How to Draw the Line Between Legitimate Commercial Activities and Those that Trigger Corporate Complicity Liability' (2015) 50 Texas International Law Journal 403, 407.
38. Michalowski (n 37) 405.
39. *Taylor Judgment* (n 12) para 395.
40. Ibid para 395; see also Michalowski (n 37) 406.
41. *Prosecutor v Perišić* (Judgment) ICTY-04-81-T (6 September 2011) paras 1592, 1594 (Perišić Judgment).
42. Ibid paras 1592–1602, 1631–1632, 1637.
43. Ibid paras 1633, 1635, 1636, 1648.
44. Ibid para 1649.
45. *Prosecutor v Perišić* (Judgment) ICTY-04-81-A (28 February 2013) (Perišić Appeals Judgment) paras 71–74.

at the *ad hoc* tribunals, the Appeals Chamber therefore required that a defendant's acts be '*specifically directed* to assist, encourage or lend moral support to the perpetration of [the] certain specific crime[s]' – a necessary link, in its view, to ensure the appropriate connection between the accused's conduct and the crime committed to warrant imposing aiding and abetting liability.[46]

Notwithstanding the line of cases developed under Perišić, subsequent ICL jurisprudence did not include the specific direction requirement.[47] If it had, it is unlikely that social media entities' conduct would meet the Perišić standard. Indeed, their conduct is not aimed at criminal conduct in any way whatsoever; it is aimed at driving long-term engagement with the platform, but regrettably employs means that fuel extremism and sow hatred in the process.

Rather, most international law jurisprudence suggests it is sufficient to require that the acts and conduct of the perpetrator have a substantial effect on the crime committed. In certain cases, it seems evident that such a standard would be met: the Human Rights Council's Fact-Finding Mission on Myanmar, for example, described the role of social media as 'significant' in spreading hate speech against the Rohingya.[48] The downside of such a case-by-case approach, of course, is the lack of certainty for corporate actors and affected communities alike. Perhaps the better plan is an intermediary approach, in which corporate actors are put on notice of the effects of their actions and offered expertise towards reforming their practices.

4.2 Proposing an independent alert mechanism

To this end, this paper proposes that the international community coalesces around developing a neutral, independent alert mechanism for reporting the use of social media to further atrocity crimes. While the precise mandate of such a mechanism is beyond the scope of this paper, its general contours will be set out below. Essentially, the mechanism would have three key features: first, a *notification* function; second, a *connective* function; and third, an *accountability* function. Taken together, these three functions would enable social media entities to be rapidly notified when their platforms are being used to further atrocity crimes, to be connected with local expertise in relation to those crimes, and to document the platforms' knowledge of their role in atrocity crimes, in case future accountability later becomes necessary and appropriate.

First, in terms of a *notification* function, the existence of an alert mechanism would enable social media entities to be immediately and publicly notified when their platforms are being used to further atrocity crimes. After all, one of the problems for these entities, raised repeatedly by the entities themselves, is their lack of local knowledge that would enable them to understand the hate on their platforms – they have often complained, for example, that they do not have sufficient translators or local

46. Ibid para 73 (emphasis added; internal quotation omitted).
47. See Luca Ferro, 'Brothers in Arms: Ancillary State Responsibility and Individual Criminal Liability for Arms Transfers to International Criminals' (2015) 54 The Military Law and the Law of War Review 139, 160; *Šainović Appeal Judgment* (n 12) para 1649 ('[b]ased on the foregoing, the Appeals Chamber, Judge Tuzmukhamedov dissenting, comes to the compelling conclusion that "specific direction" is not an element of aiding and abetting liability under customary international law'); *Taylor Judgment* (n 12) para 486.
48. UNGA Human Rights Council, 'Report of the Independent International Fact-Finding Mission on Myanmar' (12 September 2018) 39th Session (2018) A/HRC/39/64, para 74.

employees to pick up on the propaganda. In both *Perišić* and *Taylor*, it was argued that the accused must have been aware of what was occurring on the ground, and considered reports by media and international organisations, diplomatic cables and news coverage to establish that knowledge.[49] In light of the truly global spread of social media, however, it may be both unjust and unrealistic to expect these entities to be aware of the details of atrocities unfolding on all corners of the globe, or the contextual abuses of their platforms to further those atrocities.[50] A notification mechanism could alter this dynamic by establishing channels of communication specifically dedicated to raising the alarm on the role of social media platforms in atrocity crimes.

While many platforms, Facebook included, already have an internal feature enabling users to report content, it is essential that these notification systems be public and transparent. Among other things, social media users themselves should be able to see if particular content has been reported as dangerous or inaccurate by, for example, a leading human rights organisation they trust. In addition, with a multitude of platforms operating today, it is critically important that individuals have a central, trusted mechanism through which to report misuse for crimes of this gravity.

As for its *connective* function, an independent mechanism could play a pivotal role in connecting social media entities with specialists in relation to the form and locality of the crimes. Following notifications of grave abuses of their platforms, the mechanism could assist in connecting social media entities with resources to more quickly ensure that dangerous hate speech and disinformation is removed, or that algorithms are altered so that certain pages are no longer 'amplified' – cutting off the virality of key posts. This could, for example, take the form of additional translators, local experts, and active civil society organisations that could assist platforms, often based half a world away, in understanding the context and nature of dangerous content, as well as flagging additional abuse.

Finally, the existence of reports under an alert mechanism would help establish solid evidence of the entity's 'knowledge' if prosecution under ICL later became necessary or appropriate. As detailed above, establishing knowledge is often one of the most difficult aspects of aiding and abetting prosecution, and is at the heart of whether imposing liability is fair. To return to the Myanmar case study, Facebook has claimed that its efforts to regulate content were hampered by a lack of cultural knowledge, pointing to the racial slur 'kalar', which can mean either 'chickpea' or be used as a derogatory term for Muslims.[51] Similarly, if Instagram's platform is being used to further white supremacy movements in the United States, we would not necessarily expect its Silicon Valley employees to understand that the finger symbol commonly understood to signify 'okay' can also be used as a symbol of white power.[52] It may be difficult – and inappropriate – to impose liability on platforms for failing to promptly recognise highly contextual symbols and flag them for removal.

49. See *Perišić Appeals Judgment* (n 45), Partially Dissenting Opinion of Judge Liu, fn 31; *Taylor Judgment* (n 12) paras 538–539.

50. On the other hand, the extent of their data collection may well show that these entities are far from ignorant of local context and culture.

51. Anderson (n 5).

52. While the notion that the symbol had been appropriated to denote white supremacy appears to have originated as a hoax, the Anti-Defamation League reports that by 2019 'at least some white supremacists seem to have abandoned the ironic or satiric intent behind the original trolling campaign and used the symbol as a sincere expression of white supremacy'. See Anti-Defamation League, 'Okay Hand Gesture' <https://www.adl.org/education/references/hate-symbols/okay-hand-gesture> accessed 13 July 2019.

If, however, multiple reports were made to an alert mechanism on the symbol's role in relation to white supremacy, and Instagram were notified, connected with experts versed in white supremacy symbols, codewords and insignia for the locality in question, and Instagram *still* failed to act, it is more likely that future prosecution for aiding and abetting would be appropriate. The mechanism's notification function would assist in documenting knowledge of the abuses for purposes of future prosecution, and its offer of a connective function would promote prosecution in instances where it is just: where knowledge was clear, and resources to prevent mass atrocities were available and yet unemployed.

5 CONCLUDING REMARKS

Like any powerful weapon, social media holds immense potential for both good and evil. This paper's exploration of avenues for accountability for these entities originates not from any opposition to social media platforms, which have served to connect millions around the globe in legitimate and worthwhile ways, but rather out of belief in the principle that law can shape behaviour and incentivise positive action. It submits that although social media can be helpfully viewed as a weapon under the jurisprudence of the *ad hoc* tribunals, criminalisation also carries risks, and may be advisable only when the knowledge requirement for aiding and abetting liability is stringently and exactingly applied. To this end, it proposes an alert mechanism to ensure a more constructive approach towards reducing the role of social media in atrocity crimes, and to ensure a more solid basis if prosecution is ultimately pursued.

In an era where technology is largely controlled by the private sector and corporate entities hold an increasing and indisputable influence on issues of human rights, this paper seeks to further the discussion on both the responsibility for atrocity crimes and the ways that ICL can, if applied thoughtfully, help shape the future of technology and avoid its weaponisation for campaigns of hate. For the sake of the victims of atrocity crimes around the world, the field of ICL must evolve and adapt to the weapons deployed against them.