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National Director of Public Prosecutions

National Prosecuting Authority

Adv. S Batohi

Deputy National Director of Public Prosecutions

Head: Priority Crimes Litigation Unit

National Prosecuting Authority

Adv. R de Kock

By email: ndpp@npa.gov.za / rjdecock@npa.gov.za

19 June 2024

Dear Advocate Batohi and Advocate De Kock

**RE: MEMORANDUM ON THE POTENTIAL CRIMINAL LIABILITY OF WILLEM PJ EHLERS
FOR AIDING AND ABETTING THE RWANDAN GENOCIDE**

Open Secrets has prepared a memorandum motivating for the prosecution of Willem PJ Ehlers, a South African currently residing in Pretoria. We submit this memorandum in terms of section 27 of the National Prosecuting Authority Act 32 of 1998. Accordingly, we enclose for your attention an affidavit setting out briefly the investigative work Open Secrets undertook before publishing the report "*The Secretary: How Middlemen and Corporations Armed the Rwandan Genocide*" in May 2023. Attached to the affidavit is the legal memorandum motivating for the prosecution of Ehlers for the offence of aiding and abetting genocide.

Please note that we have compiled the source material on which the memorandum is based into one document, for your ease of reference. The material is available both electronically

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and/or in hard copy. Kindly let us know what the most suitable method would be for your office to receive the material.

We look forward to hearing from you.

Yours faithfully



Michael Marchant

Acting Director: Open Secrets

AFFIDAVIT

I, the undersigned,

MICHAEL MARCHANT

do hereby make oath and state:

1. I am the Acting Director of Open Secrets, a non-profit organisation established in 2017 and incorporated in accordance with the laws of South Africa. I am duly authorised to attest to this affidavit on the organisation's behalf.
2. The facts contained in this affidavit are true, to the best of my knowledge and belief. Unless otherwise stated or indicated by the context, they fall within my personal knowledge.
3. I depose to this affidavit for the purpose of reporting an offence in terms of section 27 of the National Prosecuting Authority Act 32 of 1998 to the head of an Investigating Directorate, in this case, the Priority Crimes Litigation Unit.
4. Open Secrets' mandate is to promote social justice and accountability through investigations, advocacy, and legal action. Open Secrets uses the law to hold public and private actors to account for economic violations and related human rights violations identified through its investigative work.

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5. Open Secrets has engaged in research and investigative work into the Rwandan genocide, more particularly, the role of both governments and corporate entities that enabled or facilitated the Rwandan government's purchase of weapons and access to funds.
6. In May 2023 Open Secrets released an investigative report entitled *The Secretary: How Middlemen and Corporations armed the Rwandan Genocide* ("the Report"). The Report, amongst others, describes how Willem Petrus Jacobus Ehlers ("Ehlers"), a South African national now residing in Pretoria, brokered an arms deal between the Seychelles and Colonel Théoneste Bagosora, the then Rwandan Minister of Defence. The sale of these arms occurred after the establishment of the United Nations mandatory arms embargo on Rwanda on 17 May 1994.
7. Bagosora – now considered the primary architect of the genocide – was found guilty by the International Criminal Tribunal for Rwanda of the crime of genocide, crimes against humanity and war crimes in 2008.
8. Open Secrets believes that there is sufficient evidence to show that Ehlers aided and abetted the Rwandan Genocide. Accordingly, Open Secrets have compiled a legal memorandum motivating that Ehlers' be prosecuted for the customary international law offence of aiding and abetting genocide. The memorandum, which details the grounds on which Ehlers' actions satisfy the elements of the offence, is attached to this affidavit.

9. The appendix to the memorandum lists some of the source material that Open Secrets has used. The material itself will be handed over to the office of the PCLU through whichever method the PCLU considers the most appropriate. It is our intention to continue to support the NPA by way of sourcing original documentation, additional evidence and/or expert witnesses should this be required.

10. In 1996 the United Nations International Commission of Inquiry on illicit arms flows to Rwanda recommended that the South African state investigate Ehlers for supplying arms to the Rwandan government during the arms embargo. Ehlers, however, has never been held to account for his role in the Rwandan genocide. It is thus Open Secrets' sincere submission that he be prosecuted for aiding and abetting one of the most atrocious and horrifying genocides in recent history.

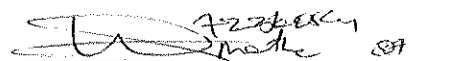


MICHAEL MARCHANT

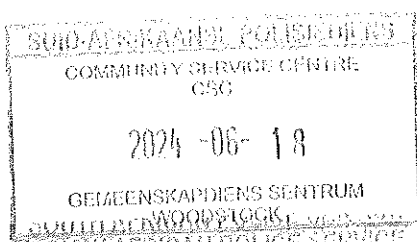
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Signed and sworn before me at ~~Cape Town~~ on this 18 day of June 2024, the deponent having acknowledged that he knows and understands the contents of this affidavit, has no objection to taking the prescribed oath, and considers the oath to be binding on his conscience. The Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.



COMMISSIONER OF OATHS



MEMORANDUM PREPARED FOR THE NATIONAL PROSECUTING AUTHORITY
ON THE POTENTIAL CRIMINAL LIABILITY OF WILLEM PJ EHLERS FOR
AIDING AND ABETTING THE RWANDAN GENOCIDE

JUNE 2024

Submitted by: OPEN SECRETS
Registration number: 2017/078278/08
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INTRODUCTION

1. Open Secrets, established in 2017, is a South African non-profit organisation dedicated to investigating and pursuing accountability for economic crimes and related human rights violations.

2. In May 2023 Open Secrets released an investigative report entitled *The Secretary: How Middlemen and Corporations armed the Rwandan Genocide* ("the Report"). The Report is, in part, a result of Open Secrets' extensive investigative work on the role of corporations and individuals in the Rwandan Genocide.¹

3. The Report includes an account of how Willem Petrus Jacobus 'Ters' Ehlers ("Ehlers"), a South African national, facilitated the procurement and sale of arms and ammunition to Rwandan government officials during the 1994 genocide. These actions took place during June 1994, after the establishment of the United Nations mandatory arms embargo on Rwanda of 17 May 1994. Ehlers transacted primarily

¹ A digital version of the Report is available at <https://www.opensecrets.org.za/the-secretary-report/>.

with the then Rwandan Cabinet Minister of Defence Colonel Théoneste Bagosora. Bagosora was found guilty of, amongst others, the crime of genocide in a judgment handed down by the ICTR in 2008.

4. In 1996 the International Commission of Inquiry on illicit arms flows to Rwanda recommended that the South African state investigate Ehlers and his company Delta Aero for supplying arms to the Rwandan government during the arms embargo.² Ehlers, who resides in Pretoria, has never been held to account for his role in the Rwandan genocide. The purpose of this memorandum is to motivate for National Prosecuting Authority (NPA) to prosecute Ehlers for the offence of aiding and abetting genocide by the. We have structured this document as follows:

- 4.1. The facts: some background
 - 4.1.1. The parties to the transaction
 - 4.1.2. The transaction
 - 4.1.3. Payment
 - 4.1.4. The weapons
- 4.2. The law: aiding and abetting genocide
 - 4.2.1. The definition
 - 4.2.2. Jurisdiction and the applicable law
- 4.3. Evidentiary factors
- 4.4. Discussion: the law and the facts
- 4.5. The duty to prosecute

² Report by the International Commission of Inquiry into the Supply of Weapons to former Rwandan government armed forces, UN, S/1996/195, 14 March 1996, para. 70 and para. 86. The International Commission of Inquiry (Rwanda) was established pursuant to Security Council resolution 1013 (1995) of 7 September 1995 to urgently investigate reports relating to the sale or supply of arms and related material to former Rwandese Government Forces in the Great Lakes region in violation of Council resolutions. It conducted investigations in the Great Lakes region and elsewhere between October 1995 and October 1996. The Commission's reports for that period can be found in documents S/1996/67, S/1996/195, S/1997/1010 and S/1998/63. The final report is attached as Annexure 1 (item 1 of the Appendix).

THE FACTS: SOME BACKGROUND

5. The Rwandan genocide is recorded as having occurred from 7 April 1994³ - 19 July 1994. It is estimated that between 800 000 and 1 million civilians - mainly of Tutsi ethnicity - were massacred during this time. It is well known, however, that widespread violence had been a feature of the political landscape for many years prior to 1994. The genocide took place within the context of a civil war that began in 1990.
6. To de-escalate the ongoing harm perpetrated against civilians, the UN Security Council imposed a mandatory arms embargo on Rwanda on 17 May 1994 ("the embargo"). Security Resolution 918 prohibited the sale or supply of arms to the territory of Rwanda until 1 September 1996. The embargo resolution described the nature of the ongoing violence spreading in the country and highlighted that many of the victims were civilian women and children who were being killed in the thousands.⁴
7. Notwithstanding the terms of the embargo, arms and ammunition continued to flow into the hands of Rwandan government forces, namely Forces Armées Rwandaises (FAR) soldiers. A Human Rights Watch report, published in May 1995, notes that Bagosora himself said that he, accompanied by "Ehlers...flew to the Seychelles on June 4 [1994], where they negotiated the purchase of arms for the FAR, which were subsequently flown to Goma."⁵
8. The arms were transported in two separate shipments between 16-19 June 1994, landing in Goma, Zaire, a city situated on the Rwandan border and a location often used for the transfer of arms to Rwanda during the Rwandan civil war and

³ The date after the assassination of President Habyarimana.

⁴ UN Security Council Resolution 918 is attached as Annexure 2 (item 2 of the Appendix).

⁵ See Human Rights Watch (May 1995), 'Rearming with Impunity: International Support for the Perpetrators of the Rwandan Genocide', United Nations HRW Vol. 7, No. 4, attached as Annexure 3 (item 3 of the Appendix).

genocide. The shipment was then transferred to a FAR base in Gisenyi, a short drive away from the border.

9. At the time of the shipment's arrival in Rwanda – mid June 1994 – the FAR were beginning to lose ground against the Rwandan Patriot Front (RPF).⁶ The level of co-ordination in the killing of the Tutsi thus intensified in a desperate attempt to eliminate "the last remaining Tutsi".⁷
10. In the weeks that followed, many Tutsi refugees that had fled to the hills surrounding Bisesero were killed. The killings were organised and brutal and evidence indicates that firearms and grenades – weapons that had been on the Ehlers shipment – were among those used in these massacres.

THE PARTIES TO THE TRANSACTION

Ehlers

11. Ehlers was born on 5 October 1948.⁸ During his early twenties (1970-1972), Ehlers underwent military training at a French submarine base before being appointed as an officer in the South African Navy. He was later seconded to President Botha's office to serve as private secretary. The Report describes in detail why and how Ehlers' time in public office equipped him to facilitate international trade in sensitive material, including arms and military equipment.⁹

⁶ The RPF has been the ruling party in Rwanda since its invasion of Kigali and defeat of the Rwandan government in April 1994. In October 1990, the Rwandan Patriotic Front invaded Rwanda from neighbouring Uganda to overthrow Juvénal Habyarimana and the ruling MRND government. This is considered the beginning of the civil war that preceded the genocide.

⁷ Alison Des Forges 'Leave None to Tell the Story', *Human Rights Watch*, 1999, p 450, Annexure 4 (item 4 of the Appendix).

⁸ Verified by SearchWorks, CSI person trace completed by Open Secrets researchers (last verified in 2015), attached as Annexure 5 (item 5 of the Appendix).

⁹ The Report, pages 9-11.

12. In 1990, following PW Botha's resignation from the National Party, Ehlers went to work at a Seychelles-based arms company, GMR.¹⁰ The company is named after Giovanni Mario Ricci, an Italian arms dealer associated with both the Seychelles and apartheid governments. Ehlers went on to become Managing Director of GMR's South African branch. I pause here to emphasise certain factors regarding GMR and its founders. Such facts explain Ehlers' connection to the Seychelles and proximity to individuals implicated in illicit dealings.

12.1. Giovanni Ricci, convicted of fraud in Italy in 1958 and, later, of possessing counterfeit cash in Switzerland, settled in the Seychelles after being expelled from Somalia.¹¹ He became a close friend and confidant of President France Albert René. Ricci assisted in establishing the Seychelles Trust Company - a joint venture with the Seychelles government in 1978. Following an attempted coup in 1981 President René turned to Ricci for the provision of security services.¹²

12.2. In the mid-80s, Ricci established the South African GMR branch with the assistance of Craig Williamson. Williamson, a former member of the South African Security police, also assisted Ricci in formalising his status as a permanent resident in South Africa.¹³ Williamson acted as Managing Director for the South African GMR branch prior to Ehlers joining the company.

12.3. The GMR group was reportedly known for having "played a sanctions-busting role in the 1980s and early 1990s."¹⁴ Williamson is on record stating that GMR was accustomed to "avoid[ing] any inhibiting laws" preventing the

¹⁰ Stephen Ellis 'Africa and International Corruption: The Strange Case of South Africa and Seychelles', *African Affairs*, Vol. 95, No. 279, April 1996, at p174, attached as Annexure 6 (item 6 of the Appendix).

¹¹ Ellis, cited above, at p 169.

¹² Ellis, cited above, at p 174.

¹³ Ellis, cited above, at p 175.

¹⁴ Stefaans Brummer 'Ehlers linked to flights in Namibia flightsy', 8 March 1996, *Mail & Guardian*, attached as Annexure 7 (item 7 of the Appendix).

import of goods into South Africa.¹⁵ GMR also facilitated the provision of arms to other African countries, including Burundi.¹⁶

13. By April 1992 Ehlers had resigned from GMR but continued, in his private capacity, to broker deals.¹⁷ In the same year he established the company Delta Aero, the primary corporate entity through which Ehlers facilitated such transactions.¹⁸

Bagosora

14. Théoneste Bagosora was born in Giciye commune, Gisenyi prefecture, on 16 August 1941. He was appointed as the Chief of Cabinet, Ministry of Defense for the Rwandan government, in June 1992.¹⁹ Following the assassination of President Habyarimana on 6 April 1994 it was Bagosora, a member of the Interahamwe militia group, who assumed de facto control of military and political affairs.²⁰

15. Shortly after Habyarimana's death, Bagosora – now considered the primary architect of the genocide – “gave the order to implement a longstanding plan to exterminate his country's Tutsi minority”.²¹

16. Bagosora was arrested in March 1996 following the issuing of an arrest warrant by the International Criminal Tribunal for Rwanda (“ICTR”) and charged with

¹⁵ Ellis, cited above, at p 175.

¹⁶ Stefaans Brummer ‘SA arms stoke Burundi fire’, 5 December 1997, *Mail and Guardian*, attached as Annexure 8 (item 8 of the Appendix).

¹⁷ See for example Stefaans Brummer ‘A complex tale of illegal high-flying’, 15 March 1996, *Mail & Guardian*, attached as Annexure 9 (item 9 of the Appendix). Mark Shaw ‘The Middlemen: war supply networks in Sierra Leone and Angola’, Working Paper 10, Netherlands Institute of International Relations, 2003, p 50, attached as Annexure 10 (item 10 of the Appendix).

¹⁸ A list of all the companies listed under Ehlers' name as of 2013 has been obtained and verified by Open Secrets. It is attached as Annexure 11 (item 11 of the Appendix).

¹⁹ See ICTR archived Press Statement ‘Bagosora and Ntagerura indicted’, 13 August 1996, attached as Annexure 12 (item 12 of the Appendix).

²⁰ Chris McGreal ‘Rwanda’s Himmler: the man behind the genocide’, 18 December 2008, *The Guardian*, attached as Annexure 13 (item 13 of the Appendix).

²¹ McGreal, cited above.

Genocide, Crimes Against Humanity and War Crimes connected to an array of atrocities he committed, ordered and oversaw as one of the government's highest-ranking officials. The case against Bagosora and three other high-ranking officials – Kabiligi, Ntabakuze and Nsengiyumva – commenced in 2002. The trial laid bare the planning and execution of a highly organised campaign on the part of the defendants to eliminate the Tutsi population.

17. In 2008 the ICTR trial court handed down judgment, finding him guilty of genocide, crimes against humanity and war crimes.²² Bagosora was sentenced to life imprisonment which was later reduced to 35 years following an appeal. He died on 25 September 2021 whilst serving his sentence in a prison in Mali.

THE TRANSACTION

18. Following the resolution to impose an arms embargo, the Rwandan government looked to private arms dealers for the provision of weapons.²³

19. The UN's final report following the International Commission of Inquiry on Rwanda (UN Commission) notes the following:²⁴

19.1. On or about 4 June 1994, Ehlers accompanied Bagosora to the Seychelles.²⁵ The purpose of the visit was to negotiate a deal for arms and ammunition²⁶ and took place directly after the two had met in Johannesburg where negotiations had reportedly commenced.

²² The Chamber pronounced its unanimous judgment on 18 December 2008. During the 408 trial days of this case 242 witnesses were heard, 82 for the prosecution and 160 for the defence. The judgment ("Bagosora") is attached as Annexure 14 (item 14 of the Appendix).

²³ See generally Brian Wood and Johan Peleman 'The Arms Fixers: Controlling the Brokers and Shipping Agents', 2000, NISAT/PRIO/BASIC Report (Oslo), attached as Annexure 15 (item 15 of the Appendix). See also page 23 of the Report for a description of these transactions.

²⁴ Final Report of the UN International Commission of Inquiry (Rwanda), 26 January 1996 ("UN Commission Report"), cited above.

²⁵ UN Commission Report at para 29.

²⁶ A shipment of munitions had reportedly arrived via the Greek vessel 'Malo'. The Malo had departed from Montenegro in March 1993 – with weapons on board - and was en route to Somalia when the Seychellois authorities reportedly intercepted the vessel on account of the arms embargo prohibiting arms shipments to Somalia. The weapons and munitions on board the Malo were confiscated and the Seychelles government put the weapons up for sale having failed to destroy them. Kathi Austin 'Illicit

- 19.2. In mid-June two consignments of arms and ammunition were flown from the Seychelles to Goma, Zaire. The first flight was on 16-17 June 1994 and the second, 18-19 June 1994.²⁷ The Seychellois authorities reportedly cancelled the third shipment after media reports stated that the arms shipments had reached Rwanda.²⁸
- 19.3. Seychellois authorities provided the UN Commission with flight plans corroborating the description directly above. These were confirmed by the UN Commission with the Independent Civil Aviation Authority.²⁹ In addition, a document purporting to certify that the aircraft carrying the shipment had been chartered for military purposes under "full military responsibility of the Ministry of Defence of Zaire" was provided. The document bore the seal of the Republic of Zaire and was signed by Bagosora (dated 16 June 1994).³⁰
- 19.4. The Seychellois authorities also provided the UN Commission with two invoice documents, dated 16 and 18 June respectively, listing the contents of each consignment. These were countersigned by a "Colonel Bagosora" on behalf of the "Forces Armées Zaïroises." The contents of the first consignment are listed as:
- 19.4.1. AK47 Rifles (25 000 units)
 - 19.4.2. 7.62 ammunition (500 220 pcs)
 - 19.4.3. Hand Grenades (2560 pcs)
 - 19.4.4. 12.7 mm HE Ammunition (33696 pcs)
- 19.5. The contents of the second consignment are listed as:
- 19.5.1. 60mm mortar (6000 pcs)

Arms Brokers: Aiding and Abetting Atrocities', *Brown Journal of World Affairs*, 2002, Vol. IX, Iss. No. 1, p 210, attached as Annexure 16 (item 16 of the Appendix). There are varying accounts, however, as to why the Malo ultimately docked in the Seychelles, see page 26 of the Report. Importantly, Bagosora's testimony before the ICTR confirms that he was in Johannesburg on 3-4 June and that Ehlers brokered the deal. The transcript of the proceedings for the date 9 November 2005 is attached as Annexure 17 (item 17 of the Appendix), from page 68.

²⁷ UN Commission Report, para 32.

²⁸ UN Commission Report, para 31.

²⁹ UN Commission Report, para 32.

³⁰ A copy of this letter is attached as Annexure 17A (item 17A of the Appendix).

- 19.5.2. 82mm mortar (624 pcs)
- 19.5.3. 12.7mm HE Ammunition (4800 pcs)
- 19.5.4. 37mm + Fuse (5440 pcs)
- 19.5.5. 14.5mm (7600 pcs)
- 19.5.6. Fragmentation Rifle Grenades (5600 pcs)

20. International arms expert Kathi Austin, who conducted field research in Rwanda and surrounding areas from November 1994 – March 1995, writes that these shipments were flown to Goma, a town on the border of Zaire and Rwanda, and delivered to the FAR in Rwanda with a Zairian military escort.³¹ Bagosora himself, in an interview with Austin on 15 February 1995 at Goma, confirmed that he had flown to the Seychelles with Ehlers and a “Zairian government representative” to “negotiate the purchase of arms for the FAR, which were subsequently flown to Goma.”³²

21. Human Rights Watch, in a report titled “Rearming with Impunity International Support for the Perpetrators of the Rwandan Genocide”³³ stated the following:

“Zairian officials, including military chiefs, have played a key role both in supplying arms and facilitating arms flows to the FAR, before but also after the international community imposed an arms embargo against Rwanda on May 17, 1994.... Human Rights Watch has evidence of a number of cargo flights that brought weapons into the Goma airport after the international community imposed an arms embargo against Rwanda in May 1994; most of these weapons were then delivered to the FAR in Gisenyi.”

³¹ Kathi Austin, cited above, at p 211.

³² See Human Rights Watch ‘Rearming with Impunity: International Support for the Perpetrators of the Rwandan Genocide’, cited above. This account was confirmed in Bagosora’s testimony before the ICTR on 9 November 2005, cited above.

³³ Cited directly above.

22. The report goes on to say that "in one important shipment, two planes of Air Zaire, a Zairian state company, flew weapons, reportedly antitank and fragmentation grenades, as well as high-calibre ammunition, to Goma from the Seychelles on the nights of June 16-17 and 18-19, 1994. These weapons were then transferred to the FAR in Gisenyi. A Zairian government functionary negotiated and accompanied the shipment from the Seychelles to Zaire.³⁴ The end-user certificates for the shipment were provided by the Zairian government, thus concealing the ultimate destination of the weapons, according to the Seychelles President."

PAYMENT

23. An Addendum to the UN Commission's Report details the series of transactions that the Swiss authorities reported to the Commission:³⁵

"Mr. Ehlers' bank account, number 82113 CHEATA, was credited with the sums of \$592,784 and \$734,099 on 14 and 16 June 1994, respectively. On 15 and 17 June 1994, the account was debited by \$180,000 and \$150,000, each payment being made to the Federal Reserve Bank of New York for the account of the Central Bank of Seychelles. According to a letter dated 30 October 1997 from the Attorney-General of Switzerland addressed to the Chairman of the International Commission, the order for the two payments made into the Ehlers account on 14 and 16 June 1994 came from the Banque nationale du Rwanda, Kigali.

24. The series of payments followed a failed attempt to have the deal paid for in traveller's cheques. An associate of Ehlers', Alfred Kalisa, was arrested on 9 June 1994 whilst attempting to deposit Thomas Cook traveller's cheques in the amount of \$1,597,000. The cheques had been flagged as being part of a batch obtained by the Banque Commercial du Rwanda that had been put on a stop list, rendering

³⁴ In support of this assertion the report references an interview with Col. Theoneste Bagosora in Goma, February 15, 1995. Bagosora's testimony before the ICTR also confirms this assertion. See the transcript for 9 November 2005, cited above.

³⁵ Addendum to the Third Report of the International Commission of Inquiry (Rwanda), S/1998/63, 26 January 1998, paras 16-27, attached as Annexure 18 (item 18 of the Appendix).

their use illegal.³⁶ The Belgian authorities' investigation into the transaction was recorded (on affidavit with annexures) and admitted into evidence at the Bagosora trial.³⁷ The exhibit, which included an affidavit from Kalisa, revealed the following:

- 24.1. Kalisa had introduced Ehlers to a man named "Mr Camille" and Mr Camille's employee "Jean Jacques" in May 1994.³⁸
- 24.2. Ehlers had told "Camille" and "Jean Jacques" that he could supply weapons stockpiled in the Seychelles.
- 24.3. It was agreed that "Camille" would supply the end-user certificate signed by the Zairean defence minister.
- 24.4. Following the second meeting in June, where "Camille" was present, along with the "defence vice minister" named "Joseph", it was agreed that Camille would hand over the requisite amount in traveller's cheques to Kalisa (\$1,141,520 adjusted for CPI in 2022).³⁹ (Belgian investigators concluded that "Camille" had in fact been Bagosora and "Joseph", Joseph Nzirorera.)
- 24.5. Kalisa was instructed to deposit the traveller's cheques into Ehlers' FNB account and then alert Ehlers. At that point, Ehlers would tell Kalisa where to transfer the money.⁴⁰
- 24.6. Following Kalisa's arrest, Bagosora contacted Joseph Nzirorera (President of Rwanda's National Assembly and Secretary-General of the MRND), who in turn contacted the BNR governor, Denis Ntirugirimbazi, to see to the payment. It was at this point that BNR began using its BNP Paribas account to transfer money to Ehlers' Swiss bank account at Union Bancaire Privee (UBP).

³⁶ See pages 46-47 of the Report for more detail. Belgian Police verified that the traveller's cheques he had received were the same as those purchased by Théoneste Bagosora on 30 May 1994 from the Banque Commerciale du Rwanda.

³⁷ *Bagosora* judgment, paras 1954 – 1957; Prosecution Exhibit 365 (Pro Justitia statement of 24 July 1995 by Olivier Bogaert and annex), attached as Annexure 19 (item 19 of the Appendix).

³⁸ In his testimony at the ICTR Bagosora testified to leaving Rwanda on 23 May 1994 to procure arms for the Armed Forces of Rwanda using official Zairean facilities, in particular Goma for transit between Rwanda and Zaire. See the transcript for 9 November 2005, cited above, p 72.

³⁹ In his testimony before the ICTR Bagosora confirmed that he had been in Johannesburg with Joseph Nzirorera on 3-4 June. See the transcript for 9 November 2005, cited above.

⁴⁰ Prosecution Exhibit 365, cited above.

THE WEAPONS

25. By mid-June many Tutsi refugees had fled to Bisesero, an elevated area about a three hour drive from Gisenyi, where FAR troops were based. Several co-ordinated attacks were carried out in that area. The Bagosora judgment noted the following from the testimony of historian and Human Rights Watch advisor Alison Des Forges:

"[F]rom early April to the end of June 1994, Tutsis sought sanctuary at the top of a hill in Bisesero. The authorities launched joint militia and military operations, attacking these refugees repeatedly during this period. The refugees used their superior positioning on the hill and rudimentary weapons, such as sticks and stones, to fend off attacks. By June, they were starving and in tatters. ...By late June, the government was determined to eliminate the surviving refugees on Bisesero hill."⁴¹

26. The Bagosora judgment accepts that during the second half of June groups of "militiamen" were sent from Gisenyi prefecture to participate in killing operations in the Bisesero hills "on orders from the government".⁴² The judgment does not, however, go as far as to link conclusively Ehlers' weapons to these killings.⁴³

"There is considerable evidence regarding Bagosora's attempts to obtain weapons in the Seychelles in June 1994 (III.6.1). Indeed, a United Nations International Commission of Inquiry suggests that Bagosora orchestrated two shipments of weapons from the Seychelles to Goma between 16 and 19 June. This evidence offers circumstantial corroboration that weapons were brought into Rwanda around this time in June.... It is unknown whether they were used in the attack on Bisesero, as Witness KJ referred to the assailants carrying traditional weapons."

⁴¹ At paragraph 1793. Des Forges referred to a letter sent from the Minister of Interior, Edouard Karemera, asking Nsengiyumva to send soldiers from his command to support gendarmes and the local population in a "clearing up" operation in Bisesero. A copy of this letter is attached as Annexure 20 (item 20 of the Appendix).

⁴² At para 1824.

⁴³ At para 1815.

27. Arriving at the conclusion described above, the ICTR noted that it had not been able to corroborate evidence from two witnesses whose testimonies suggested that the forces ordered to carry out attacks at Bisesero had been armed.⁴⁴

28. In 2012 the ICTR trial chamber handed down its judgment in Karemera and Ngirumpatse,⁴⁵ finding both guilty for their respective roles in the genocide. The judgment refers to a letter (dated 24 June 1994) from one regional leader to another confirming the arrival of militia forces from Gisenyi “to reinforce the attacks in Bisesero between 19 – 22 June 1994”. The letter, incorporated into the record before the court, notes that shots had been fired, indicating that weapons and ammunition were being used.⁴⁶

⁴⁴ At paragraph 1800 of the *Bagosora* judgment it is noted that Witness “ZF” had testified: “that, sometime in 1994, groups of militia were assembled and trained in “Gisenyi stadium”. They were eventually equipped with arms brought in from the Seychelles and transported through Goma and sent as reinforcements to Mburabuturo on ONATRACOM buses. At the height of the genocide, Hutu militiamen pursued Tutsis, forcing the latter to seek refuge on Bisesero hill in Kibuye. As the civilian attackers could not overcome these Tutsis, military reinforcement was sought from the Gisenyi high command.” The Court determined that this witness account was “second hand” and lacked “sufficient detail.” At paragraphs 1794-5 the judgment notes that witness Serushago testified that in June 1994 he saw Nsengiyumva [*Bagosora co-accused*] travelling at night from the Goma airport to Gisenyi town with two trucks requisitioned from the local brewery. He told Serushago that he was carrying weapons and asked him to inform [*Hutu forces*] that the ammunition was now available. Nsengiyumva later summoned Serushago and other Interahamwe to the military camp, requesting them to take a vehicle and call on the youth of Gisenyi to provide reinforcements for an attack on Kibuye prefecture. Serushago and Rashid Gahutu, another Interahamwe, drove Gahutu’s Toyota car around town asking youth to participate in the attack. Local party militias then gathered at the Umuganda Stadium, where they were given weapons and sent by bus to Bisesero and Nyange. Serushago sent Interahamwe under his command to assist with the Bisesero attack but did not participate in it.

⁴⁵ *Prosecutor v Karemera and Ngirumpaste*, ICTR-98-44-4, 2 February 2012. The case was affirmed on appeal on 29 September 2014. It is attached as Annexure 21 (item 21 of the Appendix).

⁴⁶ At para 1217. The ICTR case of *Kayishema and Ruzindana* ICTR-95-01, 21 May 1999, is also instructive. Witness accounts, which the court accepts, refer to the use of grenades (which formed part of the Ehlers shipment) during the June attacks. The judgment is attached as Annexure 22 (item 22 of the Appendix), see pages 156-168.

THE LAW: AIDING AND ABETTING GENOCIDE

Definition

29. The aiding and abetting of genocide as a mode of liability in international criminal law refers to acts or omissions that assist, encourage, or lend moral support to a crime and substantially contribute to its commission (the “actus reus” element). In addition, a person must act, or omit to act, with the knowledge that he or she assists, encourages or lends moral support to the crime (the “mens rea” element). Put differently, aiding and abetting genocide is an accessorial mode of liability where the accused facilitates the commission of genocide by the principal perpetrator.⁴⁷ The ad hoc and hybrid tribunals have required a causal threshold between the accused’s conduct and the principal perpetrator’s crime, i.e. that the accused’s conduct must have had a substantial effect on, or substantially contributed to, the commission of the crime (the “causal link”).⁴⁸

30. In respect of the actus reus element and the facts of this case, the following characteristics, drawn from jurisprudence, are relevant:

- 30.1. Aiding and abetting liability can arise from providing assistance to the planning, preparation, or execution of a plan when crimes, particularly crimes that are organised in character, are committed in their furtherance;⁴⁹
- 30.2. The accused need not have been present, personally, or physically, during the commission of the principal crime.⁵⁰

⁴⁷ *Blaškić* Appeal Judgment, IT 95-14-A, 29 July 2004; *Mrkšić and Šljivančanin* Appeal Judgment IT-95-13/1-A, 5 May 2009, *Kaing* Trial Chamber Judgment, 001/18-07-2007/ECCC/TC/E188, 26 July 2010.

⁴⁸ See SCSL, *Taylor*, Appeals Chamber Judgment, SCSL-03-01-A, 26 September 2013.

⁴⁹ *Šešelj* Appeal Chamber Judgment, MICT-16-99-A, 11 April 2018.

⁵⁰ *Delalić et al* Appeals Chamber Judgment, IT-96-21-A, 20 February 2001, para 352, discussed in Manuel Ventura, “Aiding and Abetting” in Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (Cambridge, Cambridge University Press, 2019), p 173-256, attached as Annexure 23 (item 23 of the Appendix).

31. Regarding the causal link attached to the actus reus requirement, it is important to note that the accused need not have possessed a certain level of authority or had an ability to exercise independent initiative to make a substantial contribution to the crimes.⁵¹ In addition, the accused's aiding and abetting need not have served as a precondition to the crime committed by the principal.⁵²

32. Regarding the mens rea element, the following factors are relevant:

32.1. the accused must have acted with the knowledge that his/her acts assisted the commission of the principal crime.⁵³

32.2. The accused need not know the precise crime which was intended and which was committed by the principal, but he/she must be aware of its essential elements, including the state of mind of the principal;⁵⁴

32.3. In cases of specific intent, such as genocide, the accused need only know/be aware of the principals' specific intent;⁵⁵

32.4. The accused need not share the intent of the principal perpetrator;⁵⁶

⁵¹ *Blagojević and Jokić* Appeals Chamber Judgment, IT-02-60-A, 9 May 2007. See also Sluiter, Goran and Yau, Sean Shun Ming, *Aiding and Abetting and Causation in the Commission of International Crimes – The Cases of Dutch Businessmen Van Anraat and Kouwenhoven* (March 29, 2019). *International Criminal Responsibility of War's Funders and Profiteers* edited by Nina H.B. Jorgensen (Cambridge University Press, Forthcoming), Amsterdam Law School Research Paper No. 2019-30, Amsterdam Center for International Law No. 2019-14, Available at SSRN: <https://ssrn.com/abstract=3362307>

⁵² *Aleksovski* Appeals Chamber Judgment, IT-95-14/1-A, 24 March 2000.

⁵³ See *Tadić*, Appeals Chamber Judgment, IT-94-1-A, 15 July 1999, *Aleksovski* Appeals Chamber Judgment, IT-95-14/1-A, 24 March 2000, *Krnjelac* Appeals Chamber Judgment, IT-97-25-A, 17 September 2003. The ICC has applied a slightly stricter standard, see the discussion in Ventura, cited above.

⁵⁴ *Aleksovski* Appeals Chamber Judgment, IT-95-14/1-A, 24 March 2000, *Krnjelac* Appeals Chamber Judgment, IT-97-25-A, 17 September 2003.

⁵⁵ *Krnjelac* Appeals Chamber Judgment, IT-97-25-A, 17 September 2003, *Vasiljević*, Appeals Chamber Judgment, IT-98-32-A, 25 February 2004, *Blaškić* Appeal Judgment, IT 95-14-A, 29 July 2004, *Krstić*, Appeals Chamber Judgment, IT-98-33-A, 19 April 2004, *Blagojević and Jokić* Appeals Chamber Judgment, IT-02-60-A, 9 May 2007, *Simić*, Appeals Chamber Judgment, IT-95-9-A, 28 November 2006.

⁵⁶ *Aleksovski* Appeals Chamber Judgment, IT-95-14/1-A, 24 March 2000, *Krnjelac* Appeals Chamber Judgment, IT-97-25-A, 17 September 2003, *Krstić*, Appeals Chamber Judgment, IT-98-33-A, 19 April 2004, *Simić*, Appeals Chamber Judgment, IT-95-9-A, 28 November 2006.

- 32.5. The accused need not have acted to assist in the commission of the principal crime;⁵⁷
- 32.6. No evidence of a plan or agreement between the aider and abettor and the principal perpetrator is required;⁵⁸
- 32.7. It is not necessary for the accused to have had authority or control over the principal perpetrator;⁵⁹
- 32.8. The crimes for which the accused stands to be convicted as an aider and abettor must be established.⁶⁰

Jurisdiction

33. The issue of jurisdiction is divided into two parts. We first discuss the challenge of legality and, second, the modes of liability that would be applicable in this context. In respect of legality, we acknowledge that it is crucial to address whether Ehlers, at the time of the alleged commission of aiding and abetting the Rwandan genocide, was bound by substantive law that criminalised such actions.

34. When Ehlers brokered the sale of arms to Bagosora, in June 1994, the Interim Constitution of South Africa (Act 200 of 1993) was in force as of 27 April 1994. The Interim Constitution stated that “the rules of customary international law binding on the Republic, shall, unless inconsistent with this Constitution or an Act of

⁵⁷ *Blaškić* Appeal Judgment, IT 95-14-A, 29 July 2004, *Mrkšić and Šljivančnin* Appeal Judgment IT-95-13/1-A, 5 May 2009.

⁵⁸ *Simić*, Appeals Chamber Judgment, IT-95-9-A, 28 November 2006, *Kaing* Trial Chamber Judgment, 001/18-07-2007/ECCC/TC/E188, 26 July 2010, *Blagojević and Jokić* Appeals Chamber Judgment, IT-02-60-A, 9 May 2007, *Muhimana*, Appeals Chamber Judgment, ICTR-95-1B-A, 21 May 2007.

⁵⁹ *Simić*, Appeals Chamber Judgment, IT-95-9-A, 28 November 2006, *Blagojević and Jokić* Appeals Chamber Judgment, IT-02-60-A, 9 May 2007.

⁶⁰ *Aleksovski* Appeals Chamber Judgment, IT-95-14/1-A, 24 March 2000, *Vasiljević*, Appeals Chamber Judgment, IT-98-32-A, 25 February 2004, *Krstić*, Appeals Chamber Judgment, IT-98-33-A, 19 April 2004.

Parliament, form part of the law of the Republic."⁶¹ Accordingly, Ehlers was bound by customary international law.⁶²

35. There is no doubt that aiding and abetting genocide is a crime under customary international law. There can also be no doubt that this was the case in June 1994. Thus, notwithstanding the fact that the South African government had not yet ratified the Genocide Convention⁶³ or the enacted the Implementation of the Rome Statute Act of the International Criminal Court Act 27 of 2002,⁶⁴ the crime of aiding and abetting genocide was firmly established as a crime under international customary law. In this respect we note, in brief, some authority for this position.⁶⁵

35.1. Article 1 of the Genocide Convention states that "the Contracting Parties *confirm* that genocide is a crime under international law". This wording, as Jackson notes, is "indicative of custom" that should be seen "to extend to other punishable acts explicitly enumerated therein."⁶⁶ The 1993 report of the UN Secretary General to the Security Council on the establishment of the ICTY confirms this position when it states that the provisions of the Genocide Convention are *part* of customary international law.⁶⁷

⁶¹ The Interim Constitution of South Africa, Act 200 of 1993, Section 231(4).

⁶² The same would have been true even before the entry into force of the interim constitution since South African common law adopted a monist approach to customary international law. See *J. Dugard, 'International Law and the South African Constitution', 1 EJIL (1997) 77, at 79*. See also *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC) at paras 37-38.

⁶³ Convention on the Prevention and Punishment of the Crime of Genocide, 12 January 1951. South Africa officially acceded to this Convention on 10 December 1998.

⁶⁴ This Act commenced on 12 July 2002.

⁶⁵ Also, see generally Ventura (cited above) from para 157 and Jackson, M, "Conspiracy to Commit Genocide: Anti Fertility Research in Apartheid's Chemical and Biological Weapons Programme", *Journal of International Criminal Justice*, Vol. 13, Issue 5 (2015).

⁶⁶ Jackson, M, "Conspiracy to Commit Genocide: Anti Fertility Research in Apartheid's Chemical and Biological Weapons Programme", *Journal of International Criminal Justice*, Vol. 13, Issue 5 (2015), at 941, attached as Annexure 24 (item 24 of the Appendix).

⁶⁷ Report of the United Nations Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para 45.

35.2. The jurisprudence of the ad hoc tribunals, particularly the ICTY, states, repeatedly, that the modes of liability set out in the ICTY establishing statute⁶⁸ have their basis in customary international law.⁶⁹

35.3. There has been a consistent practice on the part of all the modern international criminal tribunals since World War II in applying aiding and abetting genocide as a mode of liability.⁷⁰ Accordingly, aiding and abetting is included in the founding documents of all such fora.⁷¹

36. Given that no state immunities would apply to Ehlers in respect of liability, the next issue we address in this section is which body of substantive criminal law should be used domestically in a prosecution for aiding and abetting genocide.

37. The South African Implementation of the Rome Statute Act, like the Rome Statute, does not include the offence of aiding and abetting. Moreover, there is no domestic

⁶⁸ See article 7 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, 25 May 1993, which states:

1. A person who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

⁶⁹ See *Tadić*, Appeals Chamber Judgment, IT-94-1-A, 15 July 1999; *Furundžija*, Trial Chamber Judgment, IT-95-17/1-T, 10 December 1998; *Kaing* Trial Chamber Judgment, 001/18-07-2007/ECCC/TC/E188, 26 July 2010; *Nuon and Khieu*, 002/01 Trial Judgment, 002/19-09-2007/ECCC/TC/E313, 7 August 2014.

⁷⁰ The jurisprudence relevant here is discussed above in notes linked to the section on the elements of the offence of aiding and abetting genocide.

⁷¹ See Art. 7(1) ICTY Statute; Art. 6(1) ICTR Statute; Art. 25(3)(c) ICC Statute; Art. 6(1) SCSL Statute; Art. 29 ECCC Law. See also Section 14.3(c) Regulation on Panels with Exclusive Jurisdiction over Serious Criminal Offences (East Timor Tribunal); Art. 10(2) Statute of the Extraordinary African Chambers; Art. 16(1)(a) Law on Specialist Chambers and Specialist Prosecutor's Office (Kosovo Tribunal).

legislation implementing the Genocide Convention. Accordingly, there is no domesticated version of the offence of aiding and abetting genocide upon which a domestic court could rely. Nevertheless, section 232 of the Constitution states that "customary international law is law in the republic unless it is inconsistent with the Constitution or an Act of Parliament." Aiding and abetting genocide is thus a crime in South African law since the entry into force of the interim Constitution and remains a crime under the final Constitution.

38. We accept that the direct application of customary international law in a domestic criminal court is not a wholly uncontroversial process.⁷² However, the constitutional landscape, from a legality perspective, is, we argue, accepting of a direct application.

38.1. The Constitutional Court in *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another* (the Torture case)⁷³ (CCT 02/14) [2014] ZACC 30; 2015 (1) SA 315 (CC) considered it appropriate to adopt the international law definition of "torture" in the absence of a domesticated crime of torture.⁷⁴

38.2. As Jackson notes, courts have not been inclined to make a distinction among the different kinds of customary international law in applying a doctrine of incorporation. This has been the case in the constitutional and pre-constitutional era.⁷⁵

38.3. The constitutional guarantee against non-retrospectivity refers explicitly to offences under "international law"⁷⁶.

38.4. Any concern regarding whether the offence of aiding and abetting genocide was defined in a way that would enable the accused to regulate his conduct

⁷² Jackson, cited above, at 947-948. See *R v. Jones and Others (House of Lords)* [2006] UKHL 16.

⁷³ 2015 (1) SA 315 (CC).

⁷⁴ This is no longer the case since the commencement of the Prevention of the Torture of Persons Act 13 of 2013.

⁷⁵ *Nduli and Another v Minister of Justice and Others* 1978 (1) SA 893 (A). See Jackson, cited above, at 947.

⁷⁶ Section 35(3)(l) of the Constitution.

is, we argue, not a bar to prosecution.⁷⁷ Firstly, the offence of genocide was firmly grounded in customary international law as well as treaty law, the Genocide Convention. Second, the offence of aiding and abetting a crime was well established in South African law.

EVIDENTIARY FACTORS

39. The tribunals tasked with considering the offence of aiding and abetting genocide have considered the following factors insofar as evidence is concerned:

- 39.1. The position, power, authority, responsibilities and legal obligations of the accused;⁷⁸
- 39.2. The accused's presence at or near the scene;⁷⁹
- 39.3. The amount and importance of the assistance provided by the accused;⁸⁰
- 39.4. The fungibility of the assistance rendered by the accused;⁸¹
- 39.5. The passage of time between the *actus reus* and the execution of the crime;⁸²
- 39.6. Whether the principal's crime is isolated in nature or committed pursuant to a policy, plan, programme or strategy that leads to the commission of crimes in their furtherance;⁸³ and

⁷⁷ *Masiya v Director of Public Prosecutions, Pretoria and Another* (Constitutional Court of South Africa) [2007] ZACC 9, 10 May 2007.

⁷⁸ *Akayesu*, Trial Chamber Judgment, ICTR-96-4-T, 2 September 1998; *Furundžija*, Trial Chamber Judgment, IT-95-17/1-T, 10 December 1998; *Simić*, Appeals Chamber Judgment, IT-95-9-A, 28 November 2006.

⁷⁹ *Tadić*, Appeals Chamber Judgment, IT-94-1-A, 15 July 1999; *Akayesu*, Trial Chamber Judgment, ICTR-96-4-T, 2 September 1998; *Blaškić* Appeal Judgment, IT 95-14-A, 29 July 2004.

⁸⁰ *Tadić*, Appeals Chamber Judgment, IT-94-1-A, 15 July 1999; *Krstić*, Appeals Chamber Judgment, IT-98-33-A, 19 April 2004; *Taylor*, Trial Chamber Judgment, SCSL-03-01-T, 18 May 2012.

⁸¹ *Taylor*, Appeals Chamber Judgment, SCSL-03-01-A, 26 September 2013.

⁸² *Kupreškić et al.*, Appeals Chamber Judgment, IT-95-16-A, 23 October 2001.

⁸³ *Perišić*, Trial Chamber Judgment, IT-04-81-T, 6 September 2011.

39.7. The likelihood of the commission of the crime, or its commission in the same way, without the accused's acts or omissions.⁸⁴

DISCUSSION

The law and the facts

40. Having established that Ehlers, in June 1994, was bound by substantive law that criminalised the aiding and abetting of genocide, we discuss his actions in relation to the elements of the offence and the evidence. We do so with the evidentiary factors discussed above in mind.

41. The *actus reus* element of the offence is one that is easily established. Ehlers brokered an arms deal with Rwandan authorities that resulted in weapons being transported to Rwanda during the midst of a genocide. Accordingly, Ehlers provided assistance in the form of weapons to (one of) the principal perpetrators – Bagosora – who was found guilty of genocide. At the time of the transaction and subsequent shipment of the weapons the genocide was ongoing. It is thus clear that the crimes he supported were organised in character and that his support aided and abetted the furtherance of these crimes.

42. The *mens rea* element of the offence requires that Ehlers, when brokering the arms deal, acted with the knowledge that the shipment of weapons would support the genocide and had known or been aware of the principal actor's (Bagosora) specific intent.

43. To address this requirement we acknowledge that it is necessary to show that Ehlers knew he was transacting with the Rwandan authorities and knew or was aware of their genocidal intent.

⁸⁴ *Tadić*, Appeals Chamber Judgment, IT-94-1-A, 15 July 1999; *Orić*, Trial Chamber Judgment, IT-03-68-T, 30 June 2006; *Mrkšić and Šljivančanin* Appeal Judgment IT-95-13/1-A, 5 May 2009; *Šainović et al.*, Appeals Chamber Judgment, IT-05-87-A, 23 January 2014.

44. Ehlers has stated that *had* he known he was transacting with the Rwandan authorities that he would not have done so, which means he was well aware of the genocide, the UN arms embargo, and that trading with the Rwandan authorities would not only be prohibited, but result in the support of the genocide. Accordingly, we argue here, that if Ehlers knew who he was trading with then on his own version, it would amount to supporting the genocide.

45. To date, Ehlers does not dispute having brokered a deal that resulted in shipments of arms having been supplied to Rwandan forces during the genocide and in violation of the arms embargo. He has simply denied knowing that Bagosora and his company were members of the Rwandan forces.

46. In the UN Commission's third report⁸⁵ it notes that members of the Commission interviewed Ehlers during September 1996 in Pretoria. It states that although Ehlers corroborated the UN Commission's previous description of the arms deal, he was nevertheless "shocked [find out] that the recipients were in fact the former Rwandan government forces."⁸⁶

"Mr. Ehlers told the Commission that the "main spokesman and authority" that he had dealt with was a Zairian official known to him as "Hundé". It was "Hundé" and another Zairian, "Jean", who had approached him in May 1994 in Pretoria to say that Zaire wished to buy a quantity of rifles and ammunition for the Zairian military. The two told Mr. Ehlers that they would like to go to Seychelles with him and with their "technical expert" to inspect the weapons and ammunition offered for sale. The "technical expert" was Colonel Théoneste Bagosora..."

47. Likewise, in an interview with Open Secrets in August 2022, Ehlers insisted that he believed he was transacting with Zairian officials. He stated too that at the time of

⁸⁵ S/1997/1010 24 December 1997.

⁸⁶ S/1997/1010 24 December 1997 at paras 27-29.

the transaction he was insistent that he did not want the arms to end up in Rwanda or with UNITA.⁸⁷

48. While we cannot dispute that Zairian officials played a key role in supplying arms and facilitating the flow of arms to the FAR⁸⁸, there are a number of grounds on which Ehlers' purported "shock" should be dismissed or disbelieved.

48.1. Ehlers was a seasoned arms dealer, having been formally in the industry for a number of years prior to the transaction, but also at the forefront of the Apartheid's final, deeply paranoid Presidential office. His training, combined with his work as secretary to the Executive State President, rendered him a well-connected official adept at facilitating both official and clandestine deals.⁸⁹

48.2. Ehlers, in his capacity as personal secretary to Botha, would no doubt have been aware of the role of the Seychelles-based GMR in circumventing sanctions imposed on South Africa as well as Craig Williamson's illegal mercenary and intelligence operations.⁹⁰ Ehlers, as we note above, went on to manage the South Africa branch of GMR. Ehlers is reported to have had "close ties" with African politicians.⁹¹ When Ehlers spoke to Open Secrets in 2022 he stated that after having left public office he himself contacted GMR and essentially marketed himself as a French speaker whose network included African leaders whom he had met while they were 'dealing with apartheid South Africa under the table'. He stated that although his contacts did not extend to Rwanda, they did include: Félix

⁸⁷ The Report page 76.

⁸⁸ The role of Zaire is also described in the UN Commission's Reports as well Human Rights Watch's 1995 Report, cited above.

⁸⁹ Hennie van Vuuren, "Apartheid Guns and Money: A Tale of Profit (Jacana Media, Cape Town), p 226, 439, 443. During the 1980s the South African and Zairean government appeared to have enjoyed a good relationship, with Ngubanda (appointed as head of intelligence 1985), visiting with Botha and Malan in 1986. Van Vuuren describes the purpose of the meeting being the strengthening of intelligence and the continued supply of End User Certificates from Zaire. Ehlers, as secretary, would no doubt have been present.

⁹⁰ GMR is discussed above at paras 12-13. See also Ellis, cited above, at pages 175-176.

⁹¹ Stefaans Brummer 'Ehlers linked to flights in Namibia flightsy', 8 March 1996, *Mail & Guardian*, cited above.

Houphouët-Boigny (Ivory Coast), Mobutu Sese Seko (Zaire), Kenneth Kaunda (Zambia), and Hastings Banda (Malawi). He also claims to have 'became a good friend' of President Yoweri Museveni of Uganda.⁹²

48.3. As someone who was keenly aware of the dynamics of arms trading, particularly in situations where trade has been banned, it is almost impossible for him not to have known that Goma was the primary airstrip used for the delivery of all goods, be it weapons or humanitarian aid, during the Genocide when Rwandan aviation infrastructure was inoperable. Weapons had been delivered to the FAR via Goma both before and after the UN Arms embargo.⁹³

48.4. Despite having been approached by officials purporting to be from Zaire and perhaps having seen official documentation with the Zairean seal, Ehlers nevertheless travelled to the Seychelles with Bagosora. Bagosora's passport (Rwandan) was with him, and, as the ICTR noted in its judgment, there are entry/exit stamps for South Africa and the Seychelles which reflect the travel and transaction dates we discuss above.⁹⁴ Moreover, Bagosora had been the Minister of Defence since 1992 and had all but assumed control over the Rwandan forces at the time he would have met Ehlers. It is highly unlikely that Ehlers would, firstly, not have known who the Minister of Defence was, and, second, been able to mistake a government official masquerading as someone else, particularly since Bagosora had his passport on him when traveling with Ehlers. It was also no secret that Bagosora himself was exploring the continent in an effort to procure arms⁹⁵ and it reasonable to assume that Ehlers, with deep insights into the arms trade, would have known this.

48.5. Ehlers would have been aware that the payment arrangement had changed when the traveller's cheques were cancelled. He had known, firstly, that

⁹² The Report page75.

⁹³ Des Forges, cited above, at p 1005; Human Rights Watch (May 1995), 'Rearming with Impunity: International Support for the Perpetrators of the Rwandan Genocide', United Nations HRW Vol. 7, No. 4.

⁹⁴ *Bagosoro* at paras 1963-1965.

⁹⁵ See Bagosora transcript of the proceedings for the date 9 November 2005, cited above, p 68.

payment was intended to be made via cheque and had instructed Kalisa to deposit the cheques when received. Second, when this arrangement fell through, he would have had to have made his Swiss bank account details available. The money deposited into that account came from the BNP account of the Rwandan government. This could not have been missed by Ehlers.

48.6. Ehlers claims he became aware of the true destination of the arms shortly after the second shipment had left the Seychelles. Media and Seychellois opposition politicians brought the information to light. If this information was pieced together in time to halt the third consignment from departing the Seychelles then it is difficult to conceive how Ehlers himself would not have been privy to this information beforehand.

49. If Ehlers knew, which we argue he did, that he was transacting with the Rwandan government, then he was no doubt aware of genocidal intent on the part of Bagosora and that he was assisting with the commission of what amounted to an ongoing genocide.

50. In respect of the causal link between Ehlers' actions and whether they substantially contributed to the genocide, we argue the following: Although the ongoing genocide did not depend on Ehlers' brokering an arms deal, it is sufficient that large caches of arms were transported to Rwanda for the purpose of arming the Rwandan forces. The fact that there are accounts of grenades, weapons and ammunition being used in the latter part of June, i.e. after the shipments had arrived, indicate that the weapons did, in fact, land up in the hands of FAR troops and associated militias. While it is not necessary to show that the very weapons he brokered were actually used in the commission of the genocide, it is likely that they were, and this can be shown with the evidence put before the ICTR and contained in the Human Rights Watch and UN Commission Reports.

THE DUTY TO PROSECUTE

51. This is not the first time that an investigation and prosecution into Ehlers for aiding and abetting genocide has been suggested. We do, however, make the case that a South African court prosecute Ehlers for the offence using customary international law to both found jurisdiction and frame the substance of the offence and mode of liability. While we do not think this is controversial, we do accept that it is not something that South African criminal courts are ordinarily seized with.

52. Nevertheless, given the gravity of the crime and the horrors to which it contributed, there is a clear duty on the state to prosecute. We note the following:

52.1. The ICC Act's Preamble affirms that states parties are determined "to put an end to impunity for the perpetrators of [grave] crimes and thus to contribute to the prevention of such crimes". The Preamble also recalls "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". Roht-Arriaza has stated the following, albeit in relation to torture:⁹⁶

"A state's duty to prevent impunity, which can be defined as the exemption from punishment, is particularly pronounced with respect to those norms, such as the prohibition on torture, that are widely considered peremptory and therefore non-derogable – even in times of war or national emergency – and which, if unpunished, engender feelings of lawlessness, disempower ordinary citizens and offend against the human conscience."

52.2. The obligation on states to prosecute core international crimes is one that is owed to the international community as a whole.⁹⁷ Moreover, the principle of *aut dedere aut judicare* (extradite or prosecute), rooted in international but expressed too in various treaties, reinforces the obligation of states to prosecute, particularly in situations where an accused is found

⁹⁶ Roht-Arriaza *Impunity and Human Rights in International Law and Practice* (OUP, New York 1995) at 4-6.

⁹⁷ J Bantekas, *International Criminal Law* (4th Edition, 2010) 8 at 379.

in the territory of a state.⁹⁸ Genocide, as a crime against humanity (and listed in schedule 1 to the ICC Act), forms part of the category of crimes in which all states have an interest under customary international law.

52.3. Domestic legislation and policy acknowledges these duties. The NPA's Priority Crimes Litigation Unit (PCLU), established in 2003⁹⁹, is mandated, amongst other things, "to manage and direct the investigation and prosecution of crimes contemplated in [the ICC Act]". Genocide is a crime included in Schedule 1 of the ICC Act. Accordingly, the prosecution of Ehlers for aiding and abetting genocide must be considered a priority.

⁹⁸ Bantekas, at 378 and Chenwi and Sucker, "South Africa's Competing Obligations in Relation to International Crimes", *Constitutional Court Review* (2018), at 199.

⁹⁹ Presidential Proclamation on 23 March 2003.

APPENDIX
SOURCE MATERIAL

- A. "The Secretary: How Middlemen and Corporations Armed the Rwandan Genocide", Open Secrets, May 2023 (**Annexure A**).
1. Report by the International Commission of Inquiry into the Supply of Weapons to former Rwandan government armed forces, UN S/1996/195, 14 March 1996 (**Annexure 1**).
 2. UN Security Council Resolution 918 (**Annexure 2**).
 3. Human Rights Watch (May 1995), 'Rearming with Impunity: International Support for the Perpetrators of the Rwandan Genocide', *United Nations HRW* Vol. 7, No. 4. (**Annexure 3**). A digital copy is available at https://www.hrw.org/legacy/reports/1995/Rwanda1.htm#P207_48408.
 4. Alison Des Forges 'Leave None to Tell the Story', *Human Rights Watch*, 1999. (**Annexure 4**).
 5. CSI person trace completed by Open Secrets researchers (last verified in 2015). (**Annexure 5**).
 6. Stephen Ellis 'Africa and International Corruption: The Strange Case of South Africa and Seychelles', *African Affairs*, Vol. 95, No. 279, April 1996 (**Annexure 6**).
 7. Stefaans Brummer 'Ehlers linked to flights in Namibia flightsy', 8 March 1996, *Mail & Guardian* (**Annexure 7**). A digital copy is available at <https://mg.co.za/article/1996-03-08-ehlers-linked-to-flights-in-namibia-flightsy/>.
 8. Stefaans Brummer 'SA arms stoke Burundi fire', 5 December 1997, *Mail and Guardian* (**Annexure 8**). A digital copy is available at <https://mg.co.za/article/1997-12-05-sa-arms-stoke-the-burundi-fire/>.
 9. Stefaans Brummer 'A complex tale of illegal high-flying', 15 March 1996, *Mail & Guardian* (**Annexure 9**). A digital copy is available at <https://mg.co.za/article/1996-03-15-a-complex-tale-of-illegal-high-flying/>.
 10. Mark Shaw 'The Middlemen: war supply networks in Sierra Leone and Angola', Working Paper 10, Netherlands Institute of International Relations, 2003 (**Annexure 10**). A digital copy is available at https://www.clingendael.org/sites/default/files/2016-02/20030300_cru_working_paper_10.pdf.
 11. SearchWorks CIPC Directorship Ehlers (**Annexure 11**).
 12. ICTR archived Press Statement 'Bagosora and Ntagerura indicted', 13 August 1996 (**Annexure 12**).
 13. Chris McGreal 'Rwanda's Himmler: the man behind the genocide', 18 December 2008, *The Guardian*, (**Annexure 13**). A digital copy is available at <https://www.theguardian.com/world/2008/dec/18/rwanda-genocide-theoneste-bagosora>
 14. *Prosecutor v Bagosora and Others*, ICTR-98-41-T, 18 December 2008 (**Annexure 14**). A digital copy is available at <https://unictr.irmct.org/en/cases/ictr-98-41>.
 15. Brian Wood and Johan Peleman 'The Arms Fixers: Controlling the Brokers and Shipping Agents', 2000, NISAT/PRIO/BASIC Report (Oslo) (**Annexure 15**). A digital copy is available at <https://www.prio.org/publications/658>
 16. Kathi Austin 'Illicit Arms Brokers: Aiding and Abetting Atrocities', *Brown Journal of World Affairs*, 2002, Vol. IX, Iss. No. 1 (**Annexure 16**). A digital copy is available at <https://repository.library.brown.edu/studio/item/bdr:1079079/PDF/?embed=true>

17. Bagosora transcript of proceedings for the date 9 November 2024 (**Annexure 17**). A digital copy is available at <https://ucr.irmct.org/scasedocs/case/ICTR-98-41#transcripts>.
- 17A. Document purporting to certify that the aircraft carrying the shipment had been chartered for military purposes under "full military responsibility of the Ministry of Defence of Zaire", dated 16 June 1994 (**Annexure 17A**).
18. Addendum to the Third Report of the International Commission of Inquiry (Rwanda), S/1998/63, 22 January 1998 (**Annexure 18**).
19. Prosecution Exhibit 365 (Pro Justitia statement of 24 July 1995 by Olivier Bogaert and annex) (**Annexure 19**).
20. Copy of a letter from the Minister of Interior, Edouard Karemera, dated 20 June 1994, Exhibit No P3948 (**Annexure 20**).
21. *Prosecutor v Karemera and Ngirumpaste*, ICTR-98-44-4, 2 February 2012 (**Annexure 21**).
22. *Kayishema and Ruzindana* ICTR-95-01, 21 May 1999 (**Annexure 22**).
23. Manuel Ventura, M, 'Aiding and Abetting' in Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (Cambridge, Cambridge University Press, 2019), (**Annexure 23**).
24. Miles Jackson 'Conspiracy to Commit Genocide: Anti Fertility Research in Apartheid's Chemical and Biological Weapons Programme', *Journal of International Criminal Justice*, Vol. 13, Issue 5 (2015), attached as (**Annexure 24**).